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ABOUT

The BLIS Law Review allows undergraduate students to develop their passion for legal scholarship at the University of California, Los Angeles. The objective of the BLIS Law Review is to foster critical thought about topics including, but not limited to, business law, public interest law, and capital markets. Our articles are published annually by undergraduate students who aspire to create meaningful change in the legal industry.

When I founded the Business Law & Investing Society (BLIS) in 2020, I could have never imagined the creation of multiple professional and extensive BLIS Law Review volumes. Just like last year's cohort, this year's cohort has demonstrated an expertise dedication to legal scholarship. I am proud to present Volume II of the BLIS Law Review. It has truly been an honor to work with the writers, editors, and editors-in-chief. None of this would be possible without them, and I am very grateful to have had such an industrious team dedicated to the advancement of legal research. As President & Founder of the BLIS Law Review, I made a commitment to creating an inclusive, accessible pre-law organization open to all University of California, Los Angeles (UCLA) undergraduate students. With articles on diverse topics such as tax havens, private prisons, intellectual property, immigration, etc., I hope that Volume II of the BLIS Law Review inspires other UCLA students to contribute to legal research with BLIS. I look forward to reading future BLIS Law Review volumes that continue to galvanize critical thought about the law.

Sam Poursafar
President & Founder

F O R E W O R D

Over the course of the past year, it has been my utmost pleasure to work alongside the writers and editors of the Business Law and Investing Society's Law Review. To begin, I would like to thank all of the writers and editors that dedicated their time and effort to producing and polishing fascinating articles on subjects that they were particularly passionate about. I am extremely proud to have witnessed each of them overcome obstacles, think critically, and bring their visions to life. I would also like to thank Sydney Lester for her outstanding work, tireless effort, and constant dedication as Co-Editor-in-Chief and most importantly for being a dear friend. Lastly, I would like to thank the entire Business Law and Investing Society for allowing us to provide a platform for our writers and editors to do what they love. Thank you all for yet another successful year, and I am very excited for what the future has in store.

Nicolas Rumteen
Co-Editor In-Chief

It has been a great honor to have been a part of the BLIS Legal Affairs team this year. I feel incredibly fortunate to have had the opportunity to not only get to contribute my own personal interests and research to this year's volume of the Law Review as a writer myself, but also to have had the chance to work closely with such a talented, dedicated, and insightful group of writers and editors. I am incredibly proud of all the long hours and hard work that each contributor put into making this year's publication come together as it has. I would also like to thank Nicholas, my Co-Editor-In-Chief and friend, for being an invaluable guiding resource and leader during this process. I am grateful for the learning opportunities, professional experience, and friendships that joining BLIS has brought me, and I eagerly look forward to what is to come— for BLIS as an organization, and for each individual I have had the pleasure and privilege of getting to know throughout the year.

Sydney Lester
Co-Editor In-Chief

ARTICLES

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BUSINESS LAW & INVESTING SOCIETY

r/WallstreetBets vs. Robinhood: Trader Security Laws

Juliana Abraham

Abstract.

This article covers the GameStop Short Squeeze incident that occurred in January 2021. The article will first give a brief overview of the relevant background information, describe related events, and outline the history of the involved companies. From there, the article will review existing commentary on the issue and discuss how such violations can be avoided if any issues surrounding concerts over user agreements/market manipulation arise from other online trading apps. Finally, the article will discuss public perception and next steps for both parties.

I. INTRODUCTION

With its continuing rise in popularity, r/WallStreetsBets, an online Reddit group, gained notoriety earlier this year for its involvement in the resurgence of otherwise-dying stocks. In January 2021, r/WallStreetBets orchestrated a massive takeover that resulted in thousands buying stocks in BlackBerry, AMC, Nokia, and Gamestop. Unexpected to many experienced and wealthy traders, these companies' stocks began to skyrocket as their money appeared to dwindle. From this, Robinhood enforced restrictions upon these stocks so that traders could not buy nor trade the stock. With only the selling option open, r/WallStreetBets and other traders were enraged at Robinhood, who seemed to value larger-stock holders. In turn, the lack of communication on behalf of the trading company led to heavy accusations about the company's motive and values. With the history of the powers involved in the U.S. market system, many have pointed out that the Robinhood and r/WallStreetBets fiasco has further proved the lack of protection and awareness for the common people. Robinhood's capability in manipulating the market has affected the integrity of the trading system—specifically those that operate on these particular trading apps. Thus, the details of this case have shed light on the possibility of market manipulation.

The actions carried out by Robinhood follow a history of behaviors in which the Robinhood company has failed to value the interests and security of its customers. Robinhood faced backlash on this fiasco for seemingly prioritizing the financial benefits of other more powerful actors whose interests do not align with most Robinhood users. Questions regarding market manipulation have since followed. Concerning accusations of market manipulation, Robinhood and r/WallStreetsBets will also investigate the nature of order execution. Order execution details the process of what happens once a trader files an order to sell, buy, or trade a stock. Considering the freeze placed on order execution in January 2021, there will be instances in which security violations will appear in tangent with market manipulation. Ultimately, this article explores why this issue remains relevant today, the history of Robinhood's actions, the lawsuits filed on behalf of r/WallStreetBets members, and why subsequent court decisions are unsatisfactory to the general public.

II. RELEVANT BACKGROUND

A. ROBINHOOD'S HISTORY OF CONTROVERSY

The Covid-19 pandemic introduced waves of novice traders into the intricate world of day trading, long-term investing, and cryptocurrency. Among the most prominent trading platforms was an app called Robinhood. Due to its simplicity in use and zero commission fees, the app quickly attracted many new, inexperienced traders. Despite its popularity, however, Robinhood has been facing backlash since the onset of the pandemic in 2020. For the past two years, Robinhood has dealt with issues that have undermined the security of its nearly 13 million traders—ultimately resulting in a multitude of lawsuits and negative public attention regarding questionable and controversial actions from the platform.

B. THE DANGERS OF ROBINHOOD'S LACK OF TRANSPARENCY

Alexander E. Kearns, a 20 year-old college student, was among one of the first to fall victim to Robinhood. Like many, Kearns downloaded the app in 2020 due to the appeal of its straightforward design and cost-efficient fees. However, things took a turn for the worst when Kearns noticed a negative cash balance of $730,615. Though this balance was only temporary and would be corrected once any underlying stock was credited to his account, this was not made apparent to Kearns, who fell into great dismay over the thought of irreversible and unavoidable debt. Kearns was ultimately devastated by the event to the point of suicide and attributed Robinhood as a proprietor in his suicide letter revealed after his untimely and tragic death.[1] As a young individual with little experience like many other users, Kearns is a poignant example of Robinhood's power and influence.

C. r/WALLSTREETBETS & THREATS TO TRADER SECURITY

Presently, Robinhood continues to face a severity of issues that hinge on the security of its traders. The most influential of these issues arise from r/WallStreetBets. This group, totaling over 11 million members as of writing, is a subreddit that focuses on understanding and beating the trading system. The Reddit community has maintained an open dialogue of trading tips for over a decade. Amid the Gamestop fiasco with Robinhood in January 2021, r/WallStreetBets had amassed a following of 4 million followers. Hence, the rise to 11 million users in 2022 indicates that the group continues to grow in popularity for many traders entering the market.

For most of the subreddit's history, r/WallStreetBets was considered a joke. Notorious for making traders lose money, the Reddit community had little credibility until a few months before the Robinhood fiasco. One of the main contributors to r/WallStreetBets' built credibility was their success in Tesla stocks. The group rightfully predicted the influx of Tesla stock amidst the pandemic. From there, things started to change for r/WallStreetBets.

In November of 2020, conversations began to rise over the Gamestop stock in the subreddit. Ryan Cohen, co-founder and former CEO of e-commerce company Chewy, pioneered the movement alongside r/WallStreetBets. Cohen aspired for Gamestop to compete against Amazon. In a letter to the company's board in November 2020. Cohen detailed a 'roadmap' to how Gamestop can grow its financial gains and e-commerce wing. Following this, Cohen then bought 9 million stocks in December for the average price of $8.43. During the fiasco, Cohen's return on the investment rose to billions. Further, Cohen's idea sparked conversations in what many r/WallStreetBets traders viewed as a good way of making money and beating hedge-fund managers.

Though most traders' sole motivation was to make money, hedge funds still played a crucial role in the execution and perception of the Robinhood/ r/WallStreetBets fiasco. A hedge fund is a pooled investment fund that trades in relatively liquid assets and is used for more complex trading and portfolio construction. They also aid in risk management techniques such as short selling and leveraging that improve performance. Those possessing access to these hedge funds typically manage large amounts of money, and these pooled investments directly benefit the elite. Therefore, the Robinhood fiasco was designed as a way in which inexperienced, middle-class traders sought revenge on the wealthy hedge fund traders that were unsuspecting of

[1] Matt Egan, "'He Would Be Alive Today': Parents Detail Son's Desperate Attempts to Contact Robinhood before He Killed Himself," CNN (Cable News Network, February 11, 2021), https://www.cnn.com/2021/02/11/investing/robinhood-lawsuit-suicide-alex-kearns/index.html.

a rise in a trading stock that previously had minimal activity and no future predictions of fluctuation.

After months of deliberation, r/WallStreetBets members launched their mission by collecting stocks in various companies like GameStop, AMC, and BlackBerry. GameStop stock reached an all-time high on January 27, 2021, with a single share priced at around $350. Gamestop's stock subsequently rose 1,900%, which has since been coined "The GameStop Short Squeeze."

To understand what traders mean when referring to the fiasco as "The GameStop Short Squeeze," it is important to consider what shorting is. Shorting is when someone bets on losing a stock. Three steps are required to short a stock:

1. The short seller borrows stock from someone else with a promise to return it with interest after a certain amount of time.
2. The short seller sells the borrowed stocks immediately.
3. They repurchase it and return it to the original seller after a given time.

At the beginning of 2021, r/WallStreetBets had received intel that the hedge fund Melvin Capital planned on short-selling GameStop, with predictions that the COVID-19 pandemic would negatively impact the company. With plans to buy shares in GameStop, r/WallStreetBets established a short squeeze in which the amount of stock bought by them surpassed the amount sold by Melvin Capital. In the days following this, Robinhood announced a ban on the buying and trading of these companies, leading to a stand-off between more casual traders and hedge-funders.

In what r/WallStreetBets is calling "karma," Robinhood has since fallen under attack by hackers. A November data breach resulted in the leak of sensitive data (including phone numbers and full names) of an estimated 5 million Robinhood users. While no customers have reported financial losses following the event, the hackers gained the ability to remove any security features from any given user. This breach of privacy and security by hackers mimics the same actions that Robinhood itself employed on its own users in early 2021. This event thus highlights the ongoing significance of the Robinhood/WallStreetBets fiasco, and the impact the event still has in trading domains. The consequences are especially relevant to trading apps, such as Robinhood, which promote themselves as beginner-friendly and host thousands of inexperienced, young traders.

D. THREATS TO USER SECURITY IN THE COURTROOM

The GameStop Short Squeeze can be linked to a pattern of market manipulation. Market manipulation is when someone in the stock market artificially affects the supply or demand for a security. A security is a tradable financial asset. Market manipulation thus frequently results in a dramatic increase/decrease of a given stock, with one of the most common forms of market manipulation being wash trading. Wash trading is an illegal practice in which a near-simultaneous purchase and sale of a security makes a stock appear more active. In a 2014 case, the Securities and Exchange Commission, or SEC, brought on an enforcement action on Montgomery Street Research. The equity firm's owner executed an order of 100 stock purchases, all followed by a 90-second gap of time before the trade's subsequent sale. The consequences of

such market manipulation are astronomical, with Montgomery Street Research gaining an estimated $2.5 million from manipulating its investors.

Issues in market manipulation also raise concerns relating to a broker's obligation. In understanding the dynamic between a seller and buyer, each is given obligations to one another regarding order execution. These execution practices are regulated by the SEC so that brokers may provide consummation for transactions, which is provided to the seller's satisfaction on or before the closing date. If a broker fails to uphold such, it may lead to a breach of fiduciary duty. The breaching of fiduciary duties is a common ailment occurring when a broker fails to act in their client's best interest. Brokers' failure to act in the investor's best interest, and market manipulators' artificially affecting the supply and demand of securities are both prevailing issues within trading circles.

Robinhood is a company based in Menlo Park, California, so lawsuits filed by Robinhood users can be taken to the U.S District Court for the Northern District of California in San Francisco. Since 2020, Robinhood has engaged in ten open lawsuits out of the 25 filed against them since the Gamestop fiasco. However, Robinhood lawsuits have also been filed in other states, which brings Robinhood to be subjected to an astounding number of lawsuits for the company's short history of operation.

Just hours after Robinhood limited trading on several stocks, Brandon Nelson filed a first class-action lawsuit in the U.S. District Court for the Southern District of New York. The class action complaint alleges that Robinhood was involved in illegal market manipulation for their involvement in restricting users' stock control. Under the nature of action, the document states:

1. "Robinhood is an online brokerage firm."
2. "Robinhood purposefully, willfully, and knowingly remov[ed] the stock 'GME' from its trading platform in the midst of an unprecedented stock rise [and] thereby deprived retail investors of the ability to invest in the open-market and manipulated the open-market."[2]

In the Manhattan Court, Nelson sought action against Robinhood Financial LLC, Robinhood Securities LLC, and Robinhood Markets LLC. An LLC, or Limited Liability Corporation, is formed by a partnership with two or more members and protects owners from personal liability in lawsuits. Personal liability includes any personal assets not attached to the Robinhood company. So, while Robinhood is naturally liable as a company, these cases will prove to be an exception to this rule through the utilization of Section 230.

Section 230 of the Communications Act of 1934 was enacted in 1996 as an extension of the Communications Act through the Decency Act of 1996. The act provides limited federal immunity to providers and users of interactive computer services. However, federal immunity is generally inapplicable to instances in which lawsuits cover issues under federal criminal law, intellectual property law, any state law "consistent" with Section 230, certain privacy/federal/state laws regarding electronic communication, and sex trafficking. Robinhood relies heavily on Section 230 in many of its lawsuits. Two provisions of the act have been formulated to provide immunity for varying concerns. In the case of Robinhood, it appears that the issue discussed would have been best achieved through the means of the first provision. The provisions are as follows:

[2] *"Reddit v. Robinhood: Class Action,"* Yeshiva University, Cardozo School of Law, 2021, https://larc.cardozo.yu.edu/cgi/viewcontent.cgi?article=1264&context=aelj-blog.

> Provision One: "Providers and users may not 'be treated as the publisher or speaker of any information provided by another information content provider.' The service providers then have the right to editorial functions such as what content to withdraw, publish, postpone, or alter…
>
> Provision Two: Service providers and users may not be held liable for voluntarily acting in good faith to restrict access to 'obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable' [content]."[3]

Considering the provisions of the Section 230 document, the rulings for each lawsuit were indistinguishable, and Robinhood was found not guilty on all counts due to the user agreement involving information from Section 230. Provision One grants online forums the right to establish some sense of immunity and power in what the company can do or not do. In this case, Robinhood had the power to editorial functions. The user agreement found on Robinhood's page also highlights this. It says that Robinhood" may at any time, in its sole discretion and without prior notice to Me, prohibit or restrict [the] ability to trade securities."[4] Thus, Robinhood's act of freezing the trading on the GameStop Short Squeeze stocks was legal. Robinhood users agreed and accepted that the company holds this power over their stocks so long as they are operating stocks within the app.

In response to attacks on the company, Robinhood has released a statement to explain the actions taken in January of 2021. While public perception has pinned Robinhood as a service to hedge-fund managers rather than its average user, Robinhood claims that this has no relation to the reasons behind their limitation of certain stocks. Instead, the company describes the stopping of trades as a necessary action due to the nature of liquidation. Liquidating assets refers to anything of value being sold off to pay creditors when a business is closing or restructuring. The cash used is generally paid to creditors to meet a company's debt.

Early on January 27, 2021, Robinhood faced a $3 billion deficit due to the unexpected surge in purchases of stocks in Gamestop, AMC, Nokia, and other companies with low and declining share prices. Robinhood was unable to post the $3 billion due to a problem with liquidity. Robinhood's security team had to adjust the risk profile of the trading day to meet collateral. To do this, Robinhood restricted buying for 13 securities so that Robinhood's security team may liquidate the portfolio. The National Foundation for Credit Counseling (NFCC) testified that the possibility of assisting liquidation was likely if Robinhood was unable to satisfy the portfolio on its own (given that they did not restrict securities). However, this could have led to further problems with all traders who may have been restricted from the market until the NFCC was able to step in. Therefore, this risk led to Robinhood's decision to restrict assets in order to complete liquidation requests already gathered from the short squeeze.

III. GENERAL IMPLICATIONS OF SUBSEQUENT LEGAL RULINGS

[3] 47 U.S. Code § 230 - Protection for private blocking and screening of offensive material

[4] "Customer Agreement - Robinhood," 2019, https://cdn.robinhood.com/assets/robinhood/legal/Customer%20Agreement.pdf.

Though r/Wallstreetbets' attack on Robinhood is not an immediately recent event, the case has sparked many conversations surrounding the deceiving role of trading apps and big-time investors interfering with novice investors' experience in modern-day trading. However, the ongoing development of Internet globalization has led to a much louder call for changes in power hierarchies from those who have been historically silenced. This r/WallStreetBets and Robinhood fiasco is an example of such, in which the internet has provided the middle/lower class a place to voice their opinions when instances of power abuse occur.

This case highlights the need for change within our market system. With globalization, efforts in creating a fair, equal system have increased drastically. Many individuals now have access to copious amounts of educational information on issues they would otherwise have had no way of researching without the internet. Therefore, the globalization of the internet is at the roots of why the r/WallStreetBets and Robinhood fiasco exploded, with millions around the world tuning into the event. The event created conversations and debates among many who were typically unaware or uninterested in occurrences in the stock market, leading to many celebrities and powerfully wealthy people taking a stand for or against the everyday trader. With this, traders learned something new about the world they played in. The fiasco exposed an infrastructure rooted in and for the benefit of the powerful elites. It is in these rare cases that people are able to see and understand power imbalances so clearly.

Despite this issue's immediate and extensive media coverage, it faces the same problem as many issues today. Due to the overwhelmingly vast array of issues that internet users read and see every day, it is typical to witness issues drastically rise and fall at nearly the same rate. The r/WallStreetBets and Robinhood fiasco have given evidence of the injustice of the market system. It shows novice traders that, at any time, their control can be ripped away by more powerful, wealthier, and experienced traders. Media attention on this issue lingered only briefly, and today is referenced primarily only by those directly affected by these trades. Yet, this issue affects all who participate in the American economy, and demonstrates one of the many ways in which consumers and traders are subtly limited in the so-called "free market." Ultimately, though this case's popularity has waned, the issue represents an imminent threat to the basic functioning of democracy. Therefore, it is imperative to look back at this case, as the issues discussed and resolutions reached have been inadequately addressed. Today, few legal limitations would hinder any similar future events from occurring, and traders need to be made aware of the tactics and solutions that can help them mitigate any future harm that they may experience in power plays.

In order to enact change, a conversation needs to be re-opened. The coverage this issue has received in the past allowed for many powerful and influential people to speak up and share their views. Whether for or against Robinhood, any public attention allows others to join the debate and voice their concerns. It is also essential for traders to consider how they want the market to function more generally, as this issue has shown that there may be fundamental flaws in how the market is organized. Change is then in the hands of the majority, instigated by deciding what needs to happen to create the changes necessary to establish a more fair and successful market operation. One of the best solutions currently being propositioned by day-traders is to redistribute the imbalance of power by the wealthy. Although the structure of capitalism naturally results in people having varying points of power and wealth, the same system also infers that it hosts a fair and equal opportunity for anyone to do so. Consequently, there must be ways in which limits are imposed to prevent those on top from abusing their power.

The imposition of such limitations does not require monumental change, and caps on power are already an integral part of maintaining the balance of the U.S. political and economic institutions. For example, the president is an essential part of the U.S., but there are still limits to this power, enacted to avoid situations of injustice. Similarly, those top traders also need limitations, and restraining their ability to alter/remove the trading rights of other traders does not restrict their own. Since there should be no direct harm to the rights of top traders, their interests should not be entitled to outweigh the rights belonging to novice traders seeking participation in the same free market.

IV. CONCLUSION

To conclude, the history of Robinhood has been tumultuous. Robinhood faced backlash for the lack of information given to novice traders freshly entering the market with its first major controversy, and the company's inability (or unwillingness) to protect its traders became apparent with the GameStop Short Squeeze incident. After these events, Robinhood has been unable to escape the public's eye, with the most recent issue being that a significant data breach has threatened the security of Robinhood users. Each event demonstrates that even beginner-friendly trading apps require research into how to protect one's assets and securities while trading.

The issues surrounding the GameStop Short Squeeze were brought on by the conversations sparked by exclusive privileges awarded to elite hedge-funders. Ryan Cohen and r/WallStreetBets pushed for a surge in otherwise dying stocks for personal gain. This push led to a catastrophic event that will long be remembered in Wall Street history. The lawsuits against Robinhood, in turn, reveal the extent to which the average trader's rights are protected. The issues perpetrated by r/WallStreetBets traders are all issues surrounding violations of security. Security violations take on numerous forms, each related to fraud, misrepresentation, and untrue statements. The issues that traders sued on behalf of were those involving market manipulation. While concerns over r/WallStreetBets also performing market manipulation surfaced, courts ruled that Robinhood did not partake in any illegal actions, as the company's infrastructure as an LLC awarded them the legal right to exercise limitations on certain stocks in response to looming liquidity issues. This ruling contrasts with the public belief that Robinhood was actually in partnership with significant hedge funds that took major financial losses over the GameStop Short Squeeze. Furthermore, claims over r/WallStreetBets' market manipulation were never investigated, and there are more and more market participants calling for increased legal protection over the securities of everyday Americans.

The incident sparked thousands of tweets, Reddit posts, news articles, and other media platforms that voiced the opinions and thoughts of various users. Although the public's argument that Robinhood was conspiring with hedge fund managers was ultimately refuted and shut down, the event nonetheless highlights the detrimental power dynamics that have plagued the average trader throughout the market's history.

The History, Legality, and Future Implications of Affirmative Action

Josh Garland

Abstract.

Affirmative action has provided advantages to minorities in employment and university admissions. Despite the progress affirmative action has created, gaps in employment are still evident between minority and majority citizens. This article discusses the extent to which affirmative action policies can be broadened in the future and is divided into three parts. The first section gives a brief history of affirmative action. It discusses events that led to the implementation of affirmative action and gives an overview of the technical terms describing affirmative action. The second part of the article describes three major cases regarding affirmative action. These cases give an overview of the legality of affirmative action and introduce how the cases discussed could extend affirmative action in employment or create barriers for future affirmative action policies. The final section depicts an opinionated discussion on the rulings of two of the court cases described and discusses how various outcomes will affect the implementation of affirmative action in the future. The third segment will also discuss how companies can improve employment diversity when affirmative action policies cannot be implemented. Finally, the article will conclude with a discussion on why legal standards regarding affirmative action should be loosened.

I. INTRODUCTION

Affirmative action is a crucial factor in ensuring equal opportunity for minorities in employment. While private businesses are not required to have affirmative action laws, affirmative action is mandated through federally contracted businesses. However, there are situations in which private institutions can implement voluntary affirmative action procedures, which will be described later in this article. The primary issue regarding affirmative action is reverse discrimination. While protecting minorities and ensuring equal employment opportunities is critical, there needs to be a line drawn that prevents affirmative action policies from discriminating against non-minority employees. That being said, gaps in employment of minorities are evident, especially in higher paying fields. In 2019, African Americans and Native Americans had the highest unemployment rates at over 6%, and Hispanics and African Americans had the lowest employment rate in management and professional positions.[5] Therefore, considering how to increase diversity within the workforce without violating legal principles is a pressing issue.

Title VII of the Civil Rights Act of 1964 is a major element in affirmative action controversy and legal issues. It prohibits discrimination in the employment sector by helping to protect minorities. However, this raises issues about whether or not affirmative action programs violate Title VII, as the policies may end up discriminating against the majority. To clarify, there is no predefined policy regarding affirmative action. When affirmative action procedures are implemented, the particular industry must implement policies that reduce obstacles to employment and ensure equal employment opportunities for minorities; the specific plan varies between industries.[6] Furthermore, it is essential to note that affirmative action is subject to "strict scrutiny." When affirmative action programs are under review by courts, they must find that such policies are compelling interests to the government (regardless of whether the issue is local, state, or federal,) and that the policies align with achieving such interests.[7] Because of gaps in minority employment, affirmative action policies must be extended by reducing barriers to affirmative action implementation. By exploring the background of recent landmark cases, this article will demonstrate why and how affirmative action can and should be broadened in the future, and how employers can take the initiative to improve workplace diversity through voluntary affirmative action programs or applicant outreach.

II. BACKGROUND ON AFFIRMATIVE ACTION

Historically speaking, the philosophy behind affirmative action is not a new concept. Other tactics have been implemented before to shorten employment gaps between minorities and majorities and improve opportunities for these groups. After the Civil War, the US instituted various procedures as retribution for discrimination against African Americans. Directly following the end of the Civil War, reconstruction was implemented in the South to increase

[5] "Labor Force Characteristics by Race and Ethnicity, 2019 : BLS Reports," U.S. Bureau of Labor Statistics, U.S. Bureau of Labor Statistics, December 1, 2020, https://www.bls.gov/opub/reports/race-and-ethnicity/2019/home.htm.

[6] "History of Affirmative Action, Diversity and Inclusion," AAAED, Accessed February 4, 2022, https://www.aaaed.org/aaaed/About_Affirmative_Action__Diversity_and_Inclusion.asp.

[7] "Boundless Political Science," Lumen, Accessed February 4, 2022, https://courses.lumenlearning.com/boundless-politicalscience/chapter/affirmative-action/.

black political representation. Before WWII, the first idea of equal employment opportunities was implemented in the defense industry. President Roosevelt ordered defense contractors to utilize non-discriminatory procedures in hiring and employment. Finally, the Civil Rights Act of 1964 was passed to prevent discrimination in all areas, including employment. While these policies were vital to the development of affirmative action, the procedures only ensured equality among minorities and majorities. In comparison, affirmative action works to provide exclusive benefits to racial and gender minorities by allowing racial and gender consideration in applicant pools. In other words, it goes a step beyond creating equal policies in employment in order to undo prior discrimination.

President Kennedy was the first to note the concept of affirmative action upon issuing Executive Order 10925. Contractors were required to implement procedures to reverse barriers to equal employment.[8] Furthermore, contractor agencies had to take action against federal contractors who failed to ensure equal employment opportunities existed for workers.[9] President Johnson further elaborated on the concept of affirmative action in June 1965 during his graduation speech at Howard University. In this address, President Johnson described how civil rights alone were not enough to undo centuries of wrongdoing. He advocated not only for equal rights, but for increased opportunities for minorities to undo prior discrimination and reduce employment gaps between minorities and majorities.[10] In September 1965, under Executive Order 11246, President Johnson gave power over non-discrimination and affirmative action administration to the Secretary of Labor. Federally contracted employees were required to take affirmative action to make up for previous discrimination and increase minority hiring.[11] At this point, the concept of strict scrutiny did not apply to affirmative action–and it would not be implemented until the late 90s.

It is important to note that affirmative action does not constitute hard quotas or numerical goals that must be met. Instead, soft numerical quotas are used that do not have consequences for failing to be achieved. This was outlined in the Philadelphia Order in 1969, when President Nixon issued numerical goals for construction companies in hiring minorities. He revealed in an address that the federal government "'would not impose quotas, but would require federal contractors to show 'affirmative action' to meet the goals of increasing minority employment.'"[12] Essentially, contractors must take steps to meet these goals – but the numerical targets are not strict quotas. If hard quotas were to be utilized, they would lead to problems regarding reverse discrimination. Employers would feel pressured to meet strict goals, which would compel them to accept more minorities that may not be qualified for the position they are applying for. This would lead to qualified majority citizens being rejected for the sake of numerical targets being met.

Strict scrutiny is a prevalent factor in determining the legality of affirmative action. In order for affirmative action to take place, the policy must be in line with a compelling

[8] "History of Affirmative Action, Diversity and Inclusion," AAAED, Accessed February 4, 2022, https://www.aaaed.org/aaaed/About_Affirmative_Action__Diversity_and_Inclusion.asp.

[9] *Id*.

[10] "Affirmative Action, Equal Opportunity and Diversity," The University of Rhode Island, URI, Accessed February 9, 2022, https://web.uri.edu/affirmativeaction/affirmative-action-history/.

[11] "History of Affirmative Action, Diversity and Inclusion," AAAED, Accessed February 4, 2022, https://www.aaaed.org/aaaed/About_Affirmative_Action__Diversity_and_Inclusion.asp.

[12] "Affirmative Action, Equal Opportunity and Diversity," Affirmative Action Equal Opportunity and Diversity, Accessed February 9, 2022, https://web.uri.edu/affirmativeaction/affirmative-action-history/.

government interest, meaning that the affirmative action policy must be critical to the state's stability. In other words, there needs to be a history of experienced discrimination within the industry for affirmative action to be legal: contractors cannot implement affirmative action policies without a proper reason. This brings up debates in courts about whether the affirmative action procedures in question insinuate compelling government interests. It can be hard to distinguish between whether or not policies are created because institutions want them, versus if they are necessary for the state. The policies created must be narrowly tailored to government interests, and cannot be utilized for other purposes. For example, affirmative action cannot bar majority workers from entering the industry. Furthermore, the policies need to be implemented using the least confining measures possible. This means that if there is a better way for an affirmative action plan to be executed that bears less of a burden on majority employees while still improving minority opportunities, the plan needs to be revised.[13]

While affirmative action programs are mandated for federal contractors, a different situation applies to private companies. Before implementing a voluntary affirmative action program, private companies can consider finding methods to improve their applicant pool outreach to find more qualified minority candidates. Suppose a company seeks to institute a voluntary affirmative action plan. In that case, at least one of the following guidelines outlined by the Equal Employment Opportunity Commission (EEOC) need to be met:

- The current situation within the company must be disadvantageous for a group of people.
- There must be a prior history of discrimination.
- A limited labor pool must exist (this does not mean there is a lack of applicants as a whole, but rather a lack of qualified minority applicants based on race or sex).

Similar to federal contractors, private companies can acknowledge race or sex upon implementing the plan. However, just like with federally imposed policies, they cannot utilize hard quotas– they can, however, consider numerical goals without providing consequences for being unable to meet them. Additionally, the procedures cannot bar employees in majority groups, and procedures must be terminated once affirmative actions goals have been achieved.[14]

III. RECENT LANDMARK CASES THAT HAVE LEGALLY DEFINED AFFIRMATIVE ACTION

There needs to be a line that separates reverse discrimination and affirmative action. Reverse discrimination is applied when policies, individuals, or groups discriminate against majority citizens. Whether or not racial considerations constitute reverse discrimination determines the course of affirmative action policies in the future for both businesses and university admissions. In *Students for Fair Admissions v. President and Fellows of Harvard University* (2014), Students for Fair Admissions (SFFA) has been pursuing a lawsuit to remove

[13] "Boundless Political Science," Lumen, Accessed February 4, 2022, https://courses.lumenlearning.com/boundless-politicalscience/chapter/affirmative-action/.

[14] Cara Crotty, "Increase Diversity While Keeping It Legal," Affirmative Action Alert, Constangy Brooks, Smith & Prophete LLP, June 14, 2021, https://www.constangy.com/affirmative-action-alert/increase-diversity-without-violating-the-law.

the use of racial preferences in Harvard University admissions. As of January 2022, SFFA is appealing to the Supreme Court to hear their case.[15]

In the case of *University of Regents v. Bakke* (1978), the Supreme Court ruled that UC Davis's use of a strict racial quota was unconstitutional, and that Mr. Bakke was unlawfully denied admission into UC Davis's medical school. UC Davis had saved 16% of admission spots for a special program where minority applicants were reviewed using less strict criteria than the normal applicant pool, allowing under-qualified applicants to be admitted on the basis of race. While the Supreme Court ruled against the use of hard quotas, this case established that affirmative action procedures do not violate the Civil Rights Act of 1964 as long as strict quotas are not present, as only the hard quotas were found unconstitutional.[16]

On the other hand, while racial consideration is used in admitting applicants, no hard numerical target has been established in Harvard's admission policies. In contrast to University of *Regents v. Bakke,* Harvard does not create separate applicant pools for minorities. Race is incorporated in the initial review of applicants as an additional factor; in the final stage of review, some applicants may be removed from the acceptance pool after reviewing geographical and racial statistics. SFFA claimed that Harvard uses race as more than an additional factor in applicant acceptances; however, Harvard has countered this point by describing how admissions place more weight on academics.[17] Because of Harvard's lack of hard racial quotas and its holistic review of each applicant, it is not probable that the Supreme Court will grant SFFA's appeal. If the Supreme Court does classify racial consideration as unconstitutional, all affirmative action policies would hence also become unconstitutional. It would be detrimental to creating diversity in employment. Businesses would only be limited to diversity incorporation through applicant outreach. This would be problematic in cases of limited applicant pools, as there would only be a small number of minority applicants. Considering how affirmative action policies make up for a limited number of minority applicants, racial consideration is crucial to ensuring diversity in employment.

In another notable case, *Ricci v. DeStefano* (2009), an examination used as a method to promote firefighters to leadership positions was discarded based on race alone. The city of New Haven created a test that had a staggering difference in pass and failure rates across majority and minority test-takers, with minority employees doing significantly worse on the exam. This created public backlash that the test was racially biased and set the stage for a potential lawsuit by minority employees against the city. As a result, the test was discarded out of fear of being sued. However, this led to a lawsuit by the majority workers claiming that the discarding of the test violated Title VII, as they were denied promotions. Under Title VII, there are conditions in which companies may not engage in what is called disparate impact, defined as "[policies] that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities."[18] However, a company can discriminate intentionally to remove a disparate impact policy, such as what the city did when they took down the test—but only if the company would have been held liable if they had not done so. If the company would not be held liable for the

[15] Crimson Staff Writers, Deki Tsotsong, Vivi Lu, Deki Tsotsong, "SFFA Petitions Supreme Court to Hear Harvard and UNC Cases Together," The Harvard Crimson, Harvard University, November 16, 2021. https://www.thecrimson.com/article/2021/11/16/sffa-petition-combine-cases/.

[16] *Regents of University of California, Petitioner v. Allan Bakke*, 438 U.S. 265-266, 287-320 (S. Ct. 1978).

[17] Cynthia Chiu, *Justice Or Just Us: SFFA v. Harvard and Asian Americans in Affirmative Actions*, 92(2) So. Cal. L. Rev. 462 (2019).

[18] *Ricci v. DeStefano*, 557 U.S. 56 (S. Ct. 2009)

disparate impact policy, then intentionally discriminating would be considered unconstitutional. Since the court decided that the company removed the test results on the basis of race alone, the court had to find whether or not the company would have been held liable for failing to discard the test. The court employed a requirement for a strong basis in evidence that the city would have been held liable for a disparate impact policy. However, the city failed to produce evidence that the test results would have led to a disparate impact lawsuit, as no evidence that would have provided a basis for a lawsuit could be found: the tests were business relevant, and there was no equally sufficient, less discriminatory alternative. The city's only claim was that the difference in pass rate between majority and minority employees was significant. Hence, the city was ultimately found liable for violating Title VII in removing the test.[19]

The effects of this case create barriers for future affirmative action procedures in remedying disparate impact policies. In this particular case, the tests themselves were not designed to be discriminatory, but accidentally benefited white employees. For future incidents in which companies accidentally create disparate impact policies in hiring or promotional procedures, the standard for a strong basis in evidence will bar companies from using intentional discriminatory methods to reverse their disparate impact actions. In effect, this inhibits a company's ability to implement affirmative action policies when intentional discrimination may be required.[20]

While controversial affirmative action policies mainly revolve around racial minorities, they also extend to gender. A recent landmark case may create possibilities for affirmative action extending to LGBTQ+ citizens. In *Bostock v. Clayton County* (2020), Bostock was fired from his job after receiving public backlash for participating on a gay softball team. While Bostock's case was initially dismissed in the Eleventh Circuit Court, it contradicted two similar rulings, bringing the case to the Supreme Court. The question was whether or not Title VII extends to LGBTQ+ citizens on the basis of sex, as Title VII does not clarify whether or not LGBTQ+ individuals are a protected class. The court found that discrimination against homosexuality falls under discrimination of sex, as the discriminator must take sex into account. Furthermore, the court ruled that sex does not need to be the dominant factor or label for employment discrimination to violate Title VII.[21] The court cited *Phillips v. Martin Marietta Corp.* (1971), in which the company was found liable for refusing to hire women with younger children. While parenthood was the dominant reason for the company's refusal to hire women, sex still played a role in their actions. Therefore, they were found liable for violating Title VII. Similarly, although the primary reason the company in *Bostock v. Clayton County* refused to hire Bostock was his sexuality, sex still played a role in their discriminatory actions. Essentially, the court's ruling in *Boston v. Clayton* linked discrimination of sex to that of LGBTQ+ citizens.[22]

This case affirms that the Civil Rights Act of 1964, including title VII, extends to LGBTQ+ people. This groundbreaking case ensures that the LGBTQ+ community can be protected from hiring and employment discrimination on a federal level. State issues, however, remain a matter of concern. Title VII does not extend to small businesses and private contractors, so states would have to take matters into their own hands to ensure LGBTQ+ employees are protected in these

[19] *Ricci v. DeStefano*, 557 U.S. 26-28 (S. Ct. 2009)

[20] McGinley, Ann C., *"Ricci v. DeStefano: Diluting Disparate Impact and Redefining Disparate Treatment"* (2011). Scholarly Works. 646.
https://scholars.law.unlv.edu/facpub/646

[21] *Bostock v. Clayton County,* 590 U.S. 1, 9, 12-13 (S. Ct. 2020)

[22] *Bostock v. Clayton County,* 590 U.S. 12-13 (S. Ct. 2020)

fields.[23] Whether or not affirmative action policies can be extended to LGBTQ+ citizens remains a question still to be answered, and will be discussed later in this article. However, it is clear that LGBTQ+ citizens are a protected class of minorities as a result of the *Bostock v. Clayton County* case. Based on that, affirmative action applying to LGBTQ+ applicants is a definite possibility for the future.

IV. IMPROVING DIVERSITY IN THE WORKFORCE

A. HOW APPLICANT OUTREACH WORKS TO BENEFIT MINORITIES

As described above, there are specific requirements companies must meet to implement affirmative action policies. However, one question that must be addressed is how companies can institute plans to increase diversity when affirmative action policies are not allowed. One method firms can use to increase diversity is through applicant outreach. For instance, perhaps there is a lab attempting to recruit a diverse team of assistants from regional universities. However, while the actual labor pool is not limited, the lab is trying to recruit lab assistants in areas with limited diverse applicants. While the lab in this situation is choosing to recruit from universities in the area, they ought to extend their outreach efforts to community colleges, graduates who may be interested in working in a lab, and others to improve diversity. Another way companies can improve diversity is by forming a diversity committee. For example, consider a small investment firm that had no problem with recruiting a diverse field of applicants in the past, but changes in the labor pool have resulted in fewer minority applicants. While the partners may lack experience in diversity applicant outreach, putting together a team of people to extend the applicant pool and establish goals could help to improve recruitment diversity.[24] Furthermore, another advantage of a diversity committee is that individuals on the committee would already be part of the company, and thus, from an employee perspective, would be able to address any existing diversity issues within the company.[25]

B. THE NEED FOR FLEXIBILITY IN LEGAL STANDARDS OF AFFIRMATIVE ACTION

Applicant outreach, while beneficial, can have its limits. Applicant outreach would not solve the *Ricci v. DeStefano* case issues regarding firefighter promotion. Extending outreach to groups such as community colleges is only useful when there is a limited local minority applicant pool. Outreach would not have been feasible for increasing diversity in this situation, as promoting firefighters to leadership positions was conducted internally, and applicants were limited to those already employed with New Haven.[26] The same limitation can be applied to any industry which requires an examination for promotion, as employees cannot be recruited from outside the company or industry domain. This is why requirements to remedy disparate impact

[23] Malory, Meredith, and Luis Vasquez, "After Bostock v. Clayton County - Williams Institute," William Institute UCLA School of Law, August 2020, https://williamsinstitute.law.ucla.edu/wp-content/uploads/Bostock-State-Laws-Jul-2020.pdf.

[24] Madhu Chamarty. "We All Know There Is a Lack of Diversity in the Workplace. Who Is Responsible?" Entrepreneur. Entrepreneur, August 25, 2021. https://www.entrepreneur.com/article/378959.

[25] *Id.*

[26] *Ricci v. DeStefano*, 557 U.S. 1 (S. Ct. 2009)

policies need to be softened. Applicant outreach does not always have the capability of solving internal issues that lie with hiring procedures, and when companies are unable to take affirmative action to resolve mistakes in recruitment processes, it can lead to continuing gaps in employment that are unable to be resolved.

In taking a closer look at *Ricci v. DeStefano*, it is arguable that New Haven would have been liable for their disparate impact exam, and therefore reserved the right to remove the test. As mentioned above, the ruling, in this case, is especially problematic. In situations such as these, the only way to solve the issue would be by remedying the unintentional discriminatory test, which would violate Title VII. New Haven's actions were considered unconstitutional because there was no equal or less discriminatory alternative. However, many Caucasian test-takers had access to study material over a month before minority test-takers due to having family members within the field. The tests were reviewed from individuals outside of New Haven, leading to irrelevant questions being placed within the exam. Furthermore, other cities have emphasized oral examinations as they demonstrate candidates' leadership capabilities, and the oral examinations have been proven to be more racially fair. Nevertheless, New Haven chose to place a greater emphasis on the written part of the examination. Arguably, this also demonstrates that the tests were not consistent with business necessities.[27] If the tests failed to determine which firefighters would be best suited for a lieutenant position due to the emphasis on the written portion, they would not be consistent with business necessity. Based on the evidence above, New Haven should have been held liable in a disparate impact suit, contrary to the court's ruling. If the court ruled in favor of New Haven, the requirements for meeting the standard for a strong basis in evidence could become more flexible, thus giving companies an easier ability to resolve recruitment diversity issues in the future. For future cases, it is essential for courts to be more open in defining what satisfies the strong basis in evidence standards. This increased flexibility would not be used to create easier paths for reverse discrimination to occur, but rather to prevent disparate impact discrimination. New Haven was not attempting to intentionally discriminate against minority applicants, but rather take affirmative action in remedying an unintentionally discriminatory test.

C. EXTENDING AFFIRMATIVE ACTION TO LGBTQ+ CITIZENS

Regarding affirmative action being extended to LGBTQ+ citizens in employment, the strict scrutiny standard would also have to be applied. In *University of Regents v. Bakke*, Justice Powell stated that increased diversity among universities represented a compelling government interest, as diversity helped facilitate higher quality education in universities and the development of new leaders.[28] While his statement applied to universities, it can arguably be applied to private businesses and federal contractors as well. Especially in industries that serve the general public, such as law firms, law enforcement, or even department stores, having diverse opinions will promote a more equal working environment. Furthermore, a diverse workforce can ensure that the general public's needs and wants are met, as employment would include individuals representing a variety of people's backgrounds. Statistics demonstrate that LGBTQ+

[27] *Ricci v. DeStefano*, 557 U.S. 31-32 (S. Ct. 2009)

[28] Herbert C. Brown Jr., *A Crowded Room or the Perfect Fit? Exploring Affirmative Action Treatment in College and University Admissions for Self-Identified LGBT Individuals*, 21 Wm. & Mary J. Women & L. 609 (2015), https://scholarship.law.wm.edu/wmjowl/vol21/iss3/3.

citizens are underrepresented in the workforce. Transgender workers experience double the unemployment rate compared to the average American and are over three times as likely to experience wages that correlate to poverty levels.[29] The gaps in employment between LGBTQ+ citizens could also satisfy strict scrutiny as a compelling government interest. It is also important to realize how *Bostock v. Clayton County* established that LGBTQ+ citizens are a protected class under the Civil Rights Act of 1964's gender protection. These three ideas can serve as a potential basis for affirmative action applying to LGBTQ+ citizens. In doing so, there would be a similar benefit to the policies implemented for racial minorities. There would be a decrease in unemployment rates and a narrower employment gap between LGBTQ+ citizens and majority citizens. However, it is necessary to note that this idea remains controversial, and there are many conflicting viewpoints. For instance, there is an argument that LGBTQ+ civil rights and representatives have gained significant support over the years, and affirmative action should not be provided as they already have substantial political power.[30]

V. CONCLUSION

Affirmative action has played a critical role in advancing minority rights. Ultimately, there are still gaps in employment between minority and majority citizens that need to be addressed. To recap, affirmative action does not constitute reverse discrimination as hard quotas are considered unconstitutional, thus preventing reverse discrimination from being applied. As such, it is unlikely that SFFA's ongoing petition to the Supreme Court will be approved due to the nature of Harvard's applicant review process, so it can be expected that affirmative action policies will remain intact in the future. Going forward, there ought to be a loosening of restrictions in the standards for a strong basis in evidence. It is not always obvious in recruitment processes when a particular action may hinder racial diversity; thus, it is critical that companies have the ability to take affirmative action against unintentional discriminatory actions. New Haven was a special case in which either majority or minority applicants would have been unhappy depending on whether or not New Haven decided to remove the tests. However, giving flexibility to companies in these situations is necessary as it will prevent industries from having to tackle lawsuits because of accidental situations. Loosening the restrictions of the strong basis in evidence standard is critical to remedy accidental discrimination as well. Moreover, affirmative action should be extended to LGBTQ+ applicants in the future. As noted above, there is evidence of employment gaps among LGBTQ+ citizens, and *Bostock v. Clayton County* has set a precedent that LGBTQ+ citizens are protected under the Civil Rights Act of 1964. By taking affirmative action to advance LGBTQ+ employment, employment gaps can be lowered. Even if affirmative action policies are not extended, companies can still take measures to increase diversity through applicant outreach and diversity committees. By extending affirmative action policies and providing opportunities for employers to take initiatives themselves through applicant outreach, employment gaps between majority and minority groups can be reduced in the future.

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[29] "Transgender Workers at Greater Risk for Unemployment and Poverty," National LGBTQ Task Force, September 6, 2013, https://www.thetaskforce.org/transgender-workers-at-greater-risk-for-unemployment-and-poverty/.

[30] Herbert C. Brown Jr., *A Crowded Room or the Perfect Fit? Exploring Affirmative Action Treatment in College and University Admissions for Self-Identified LGBT Individuals*, 21 Wm. & Mary J. Women & L. 605 (2015), https://scholarship.law.wm.edu/wmjowl/vol21/iss3/3.

Telehealth and Cybersecurity: Assessing the Privacy and Security Risks for Consumers of Distanced Care in a Post-Pandemic Future

Sadhana Jeyakumar

Abstract.

During the COVID-19 pandemic, many patients turned to telehealth services for fear of getting infected at a hospital or clinic. With direct communication, such technologies enable consumers to receive medical care from the comfort of their homes and healthcare practitioners to reduce medical overhead costs, including office work and front desk help. However, such conveniences give rise to the issue of transferring medical information through online systems vulnerable to theft, hacking, and misuse. This article analyzes and assesses the privacy and security risks for consumers of telehealth services before and during the COVID-19 pandemic. From exploring two major court cases, *LabMD Inc., v. FTC*, and *Teladoc Inc., v. The Texas Medical Board*, the article calls for strict federal regulations governing the handling and communication of healthcare information. It addresses this need by examining current telehealth policies, including the FTC Act and the HIPAA Security Rule. The article also highlights the successes of telehealth services and the benefits of deregulation during a state of emergency but reveals the legal implications of absent federal policy frameworks. The proposal is that the medical field should push for a comprehensive system that includes strict guidelines concerning the storage of medical information in the context and spaces of services. Such measures will help the medical field responsibly grow telehealth services with cautious optimism in the future.

I. INTRODUCTION

Telehealth is a booming industry supporting virtual life–a reality accentuated by the recent COVID-19 pandemic. Telehealth practices include care services, virtual examinations, and activities related to health education. Distanced programs include remote patient monitoring, consultations, medical imaging, and health education classes. Telemedicine works as a branch of telehealth wherein care does not follow physical examinations, a practice deemed highly inappropriate in emergencies.

Demand for telehealth services has skyrocketed during the pandemic, as distanced care became a necessity rather than an option. However, telehealth lacks proper legal standing with no uniform regulations and supportive financial structures, despite mounting social pressures concerning patient protection. Moreover, virtual care can compromise patient safety and security, particularly regarding identifiable data, medical malpractice, and reimbursement parities. In the field of business law, patient rights and respect to privacy hold significance, as healthcare information is susceptible to breaching and exploitation, such as with medical identity theft. Several historical and contemporary cases also highlight the negative consequences of inappropriately sharing medical information on platforms with public access, such as sexual patterns recorded by FitBits or related medical technologies.

For the most part, the Federal Trade Commission (FTC) protected consumer data solely in commerce and business practices. However, its authority expanded regarding data privacy and security in telehealth services following a controversial court case. In *LabMD Inc. v. Federal Trade Commission*, the defendant's complaint asserted that the FTC wields no authority to enforce the security of Protected Health Information (PHI), prompting the Commission to extend its role to the medical field.[31] However, with the ongoing pandemic, several changes to telehealth policies have loosened privacy regulations to make telemedicine more accessible in the state of emergency. In the history of telehealth in business law, services highlighted accessibility, specifically for remote populations, and data privacy issues. Such concerns led to the passing of the Federal Trade Commission (FTC) Act and the Health Insurance and Portability and Accountability (HIPAA) Act, both of which regulate data usage and oversee electronically protected health information (ePHI) storage. However, the virtual setting of telehealth services presents newfound risks of data breaching, medical malpractice, and consumer vulnerability. Cases, including *LabMD, Inc., v. FTC* and *Teladoc, Inc., v. The Texas Medical Board*, spotlight such occurrences and call to attention for robust policies protecting consumers from medical identity theft and healthcare practitioners from career-threatening lawsuits. Given the upswing in scrutiny over telehealth practices, telemedicine companies and related agencies should proactively comply with legitimate programs and regulations, ensuring that physician-patient communications are protected during and following the COVID-19 pandemic.

This article explores the previous arguments by first assessing the two court cases mentioned above: *LabMD, Inc., v. FTC* and *Teladoc, Inc., v. The Texas Medical Board*. From this analysis, the article argues that despite the successes of telehealth services in providing accessible healthcare to distanced populations or in states of emergency, the absence of a federal

[31]John Kennedy & Robert Langer, *The LabMD Decision Reins in the FTC's Authority to Issue Broadly Worded and Ill-Defined Orders*, National Law Review (2018), https://www.natlawreview.com/article/labmd-decision-reins-ftc-s-authority-to-issue-broadly-worded-and-ill-defined-orders.

policy framework gives rise to medical identity theft and related crimes. Moreover, loosened or unclear guidelines leave healthcare practitioners susceptible to lawsuits as they act upon ungrounded assumptions. Thus, the article proposes that the medical field implement strict regulations and systems for responsible usage of medical information in identifiable spaces.

II. BACKGROUND INFORMATION

The COVID-19 pandemic has prompted healthcare providers to expand their use of telehealth to connect with patients in virtual settings. Telehealth services existed decades before the pandemic, but few incentives existed in adopting and enforcing protection laws for patient security due to minimal demand.

A. HISTORY OF TELEHEALTH IN BUSINESS LAW

Sending and sharing data elicits little fascination in contemporary times, as it has become common practice to communicate across large distances. This practice only became mainstream in recent years, as telecommunications existed in small numbers prior to the 21st century. In fact, the first recorded instance of sharing medical information took place in Pennsylvania in 1940, when two medical practitioners sent radiology images over 24 miles to each other.[32] Earlier examples of applications include using radios to communicate medical advice to clinics on ships in the 1920s.

Over time, telehealth became an asset–if not a solution–for providing healthcare to remote and rural areas: the Space Technology Applied to Rural Papago Advanced Health Care (STARPAHC) project, for example, implemented telehealth communications to treat Native Americans and other distanced populations.[33] As technology advanced, telehealth and its applications grew: telephone-based support evolved into telemonitoring by video, and mobile applications developed to measure and wirelessly transmit information, such as blood pressure, blood glucose, and heart rate. These advancements prompted a greater need to regulate alleged telehealth violations and protect telemedicine consumers.

California became the first state in the United States of America (USA) to regulate the delivery of distanced care under the Telemedicine Development Act of 1996, which required patients to provide consent before receiving any telemedicine services. Today, verbal or written consent is accepted for most telemedicine services, with no preference for either form.[34] As other states joined California in authorizing telehealth services, telemedicine laws and regulations entered murky waters, as broadly worded policies gave rise to ambiguous suggestions. For instance, Washington State law requires medical assistants to be supervised by a healthcare practitioner, but the definition of supervision initially lacked clarity in virtual settings, as it only considered in-person care.[35] A new law recently clarified the definition by adding telemedicine

[32] Thomas Nesbitt, *The Evolution of Telehealth: Where Have We Been and Where Are We Going?*, National Center for Biotechnology Information (2012), https://www.ncbi.nlm.nih.gov/books/NBK207141/.

[33] Peter Ruiz & Jeremy Greene, *STARPAHC, a Telemedicine Project: An Oral History Interview with Peter A. Ruiz*, 63 Journal of the Southwest 75–131 (2021).

[34] Senate Bill 1665 U.S.C. § 2290.5 (1996), http://www.leginfo.ca.gov/pub/95-96/bill/sen/sb_1651-1700/sb_1665_bill_960925_chaptered.pdf.

[35] 18 R.C.W. § 360.010 (2021)

services as care scenarios in which medical assistant supervision is provided through interactive audio or video technologies.[36]

In 2012, Congress passed the Food and Drug Administration Safety and Innovation Act to develop a structure for securing health information in medical technologies and mobile applications.[37] The act was passed after consulting with the Federal Communications Commission (FCC), an agency responsible for interstate and international communications operations across American territories, and the Office of the National Coordination for Health Information Technology (ONC). These three agencies also came together in 2014 to collectively uphold their respective authority in telehealth regulations for emerging technologies. Despite collaborative efforts, there was still a need for a single agency to overlook telehealth regulations on a federal level to mitigate logistical challenges, such as data breaching. Moreover, a single agency would establish an overarching framework for health information technology that could overpower conflicting state regulations.

B. THE FEDERAL TRADE COMMISSION (FTC)

Prior to 2014, the Federal Trade Commission (FTC) was primarily responsible for consumer protection in the fields of commerce, including some banks, insurance companies, non-profits, and transportation entities.[38] The agency focused on protecting competition between agencies while securing consumer information and safety. FTC regulations are contained within the FTC Act, which overarchingly amends the following:

1. Unfair methods of competition and practices which affect commerce are prohibited.
2. Consumers adversely affected through injurious conduct are to be provided relief or monetary compensation.
3. Deceptive practices and acts are prohibited through the establishment of governing rules.
4. Organizations engaged in commerce must comply with data collection and the conduct of investigations by the FTC.
5. The FTC is responsible for reporting suggestions to Congress and the general public.

While the agency still upholds these regulations, it expanded its authority to encompass regulations and consumer protection in the field of telehealth in recent years. This change followed a controversial court case beginning in 2013 in which the FTC filed a complaint against LabMD, a medical testing laboratory, claiming that the company failed to protect consumer data and medical information.[39] According to the plaintiff's complaint, LabMD documents containing sensitive information on consumers were stolen by identity thieves and shared on publicly accessible networks.

The FTC argued that companies must take responsibility for consumer data. The FTC proposed that LabMD immediately implement a comprehensive data security program to be

[36] Medical Assistant Supervision, H.B. 1378, 67th Cong. § 360.010 (2021)

[37] Rita Marcoux & Randy Vogenberg, *Telehealth: Applications From a Legal and Regulatory Perspective*, National Center for Biotechnology Information (2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5010268/.

[38] Federal Trade Commission Act 15 U.S.C § 46 (1914), https://www.ftc.gov/sites/default/files/documents/statutes/federal-trade-commission-act/ftc_act_incorporatingus_safe_web_act.pdf.

[39] *LabMD Inc. v. Federal Trade Commission*, 891 F. 3d 1286, 1300 (11th Cir. 2018).

evaluated regularly for twenty years to ensure this regulation. However, LabMD is a covered entity under the Health Insurance Portability and Accountability Act (HIPAA), so the court held that the cease and desist order was not enforceable because there were no prohibitions. Nonetheless, the court ordered LabMD to replace its data security program with a more comprehensive system that meets reasonable standards as proposed by the FTC. Moreover, the court encouraged the FTC to look beyond law enforcement and promote healthcare competition and consumer protection.

C. HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT (HIPAA)

The Health Insurance Portability and Accountability Act (HIPAA) offers guidelines on telemedicine and the practice of providing remote services in safe and secure environments. The act is enforced by both the United States (US) Department of Health and Human Services' Office for Civil Rights (OCR) and the American Telemedicine Association (ATA). As the severity of the COVID-19 pandemic became apparent, OCR announced on March 17, 2020, that it would not punish for noncompliance with HIPAA rules to increase the accessibility of telemedicine in a nationwide public health emergency.[40] However, the ATA later expressed that it supports the reinstatement of HIPAA requirements after the public health emergency ends to ensure the protection of patient data.

Similar to the FTC Act, the HIPAA regulations on telemedicine are contained within the HIPAA Security Rule.[41] The HIPAA Security Rule state the following:

1. Only authorized users should have access to electronically protected health information (ePHI).
2. A system of secure communication should be implemented to protect the integrity of ePHI.
3. A system of monitoring communications containing ePHI should be implemented to prevent accidental or malicious breaches.

The first outlined guideline meets standard patient protection ideologies, as it ensures that health information is only accessible by licensed physicians or authorized insurers. However, telehealth consumers are limited in obtaining personal information, as all data is encrypted, thereby bringing into question the validity of electronically protected health information.

The second and third rules rely heavily on establishing secure forms of communication that can be manipulated with remote access, such as deleting information or removing a meeting member. The issue with these forms of communication is that it depends on how ePHI is stored. When ePHI is created and stored by a third party, such as an authorized insurance agency, the covered entity must meet the Business Associate Agreement (BAA), which covers all methods employed by the third party to protect the data and regulate information auditing.

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[40] Jordan Scott, *How Telemedicine Requirements Will Change Post-Pandemic*, HealthTech (2021), https://healthtechmagazine.net/article/2021/07/how-telemedicine-requirements-and-policies-will-change-post-pandemic-perfcon.

[41] Richard Bailey, *What is the HIPAA Security Rule?*, Atlantic.Net (2021), https://www.atlantic.net/hipaa-compliant-hosting/what-is-the-hipaa-security-rule-safeguard-checklist/.

III. MAJOR CASE RULINGS AND LEGAL CONFLICTS

Due to the difficulty of documenting evidence, the virtual nature of telehealth services presents legal challenges for mistreated consumers to report medical malpractice. Consequently, the malpractice track record in telemedicine is questionably unscathed, with few reported cases spanning decades of service. Furthermore, most cases are also likely not reported due to confidentiality agreements, an ironic side effect of enforcing privacy regulations related to delivering healthcare through telehealth modalities. Hence, there exists a fine line between which information should and should not be disclosed in the field of medicine and telehealth, an idea emphasized in the following court cases.

A. DATA BREACH OF MEDICAL INFORMATION

The *LabMD Inc. v. FTC* court case was pivotal in emphasizing the Federal Trade Commission's limited authority in determining data privacy and security practices as unfair activities under 15 USC § 45(n) of the FTC Act.[42] Despite the FTC first taking the initiative to expose LabMD for data breaching, the court criticized the FTC for issuing an unreasonable order given limited authority over the matter.

As described previously, the Commission filed a complaint against LabMD in August 2013 for violating the FTC Act by providing limited protection for consumer data and private information. According to FTC allegations, LabMD's billing manager composed a 1,718-page file, which included the personal information of 9,300 consumers, and was made readily available for direct downloads on the public peer-to-peer application LimeWire.[43] Not long after the incident, Tiversa Holding Company, a data security company that provides cyber threat intelligence, remediation, and risk management services, approached LabMD regarding identity theft. According to Tiversa, the uploaded file was both shared online and accessed by known identity thieves. When LabMD refused to purchase Tiversa's risk management services, Tiversa notified the FTC about the incident, immediately prompting the FTC to file a complaint against LabMD.

With potential violations of consumer rights and protection policies, the FTC revealed during the 2015 evidentiary hearing that the 1718 file was never in the possession of identity thieves. Subsequent investigations disclosed that Tiversa had manipulated its reports to show that the file was downloaded from different IP addresses and, therefore, by various identity thieves.[44] The case resultantly shifted from a direct complaint against data breaching to a warning against future identity theft. Nevertheless, as there was no substantial injury to LabMD consumers, the FTC's case was ruled unreasonable based upon unspecified claims.

Medical information contains personal information regarding patient health, treatment plans, and even financial status. Such information can be used to create information packages called "fullz" and "identity kits," and put up for sale on the deep web. Those who purchase these

[42] John Kennedy & Robert Langer, *The LabMD Decision Reins in the FTC's Authority to Issue Broadly Worded and Ill-Defined Orders*, National Law Review (2018), https://www.natlawreview.com/article/labmd-decision-reins-ftc-s-authority-to-issue-broadly-worded-and-ill-defined-orders.

[43] Id.

[44] Id.

items can use stolen medical information to create a counterfeit imitation of a victim and engage in illegal immigration, pedophilia, or the exploitation of protected services. For these reasons, among several others, the FTC issued a cease and desist order requiring LabMD to institute strict compliance measures following the court's ruling against FTC's case. LabMD appealed the decision while the FTC denied the motion to stay. On appeal of the decision, the court declared that the FTC had misinterpreted 15 USC § 45(n) of the FTC Act. However, the court concluded that on narrower and more holistic grounds, LabMD's actions were inappropriate in the context of consumer data protection. Moreover, the court argued that to punish LabMD and similar actions under data breaching claims, the FTC would need to present a particular act or rule that the court can enforce in a trial.

While the FTC's cease and desist order was vacated, and LabMD logistically won the case, the ruling nevertheless spurred the movement for more legally enforceable regulations concerning data protection, especially with medical information. The *LabMD Inc. v. FTC* court case reinforced to the public that even certified organizations, like LabMD, can become sources of data breaching and unauthorized sharing of medical data. To protect consumers regardless of where their information is stored, a newfound, robust policy that holds power on legal grounds needs to be implemented. These policies would also greatly benefit telemedicine practices, as they would protect consumer information shared across a virtual platform.

B. PRIVACY PROTECTION AND SPACE

At the beginning of the COVID-19 pandemic, the Office for Civil Rights under the US Department of Health and Human Services (HHS) eased the way for medical professionals to use common social media platforms, including Apple FaceTime, Facebook Messenger, and Skype, to communicate with patients. To prevent violations against security compliance policies, the US government also lifted privacy penalties, thereby shielding healthcare providers from the FTC Act as well as the HIPAA Security Rule. Healthcare professionals must inform patients about potential privacy risks when using third-party applications and obtain prior consent. However, third-party applications are public digital platforms, so they are highly susceptible to data security breaches even with encryption and privacy modes.

In another respect, telehealth services proctored through social media may comply with HIPAA guidelines if they follow HIPPA compliant procedures. The HHS states that "covered health care providers that seek additional privacy protections for telehealth while using video communication products should provide such services through technology vendors that are HIPAA compliant and will enter into HIPAA business associate agreements in connection with the provision of their video communication products."[45] According to this statement, a doctor who uses Facebook Messenger to communicate with a patient for a virtual clinical visit must first complete a business associate agreement with Facebook. However, Facebook is not thoroughly HIPAA compliant since it engages with the public to create a platform for open discussion, commentary, and sharing. For this reason, the HHS guidance is unclear and difficult to follow, as it implies more significant challenges for healthcare practitioners who engage with mainstream social media and virtual platforms.

[45] Kate Kaye, *HHS notice on telehealth penalties raises privacy concerns*, Iapp.org (2020), https://iapp.org/news/a/hhs-notice-on-telehealth-penalties-raises-privacy-concerns/#.

Doctors and other healthcare workers have used public platforms in the medical field, such as for board meetings, communication regarding appointment dates and times, and for other low-risk activities. Even so, digital communications were never commonplace in the medical field, especially remote communications with patients. In the context of the COVID-19 pandemic and the ease of privacy protection policies, concerns have arisen regarding the standing of the HIPAA Security Rule and the FTC Act, as patient rights and respect to privacy wield great significance in business law. However, it remains questionable whether it is lawful to share patient medical information with non-HIPAA compliant technologies while using HIPAA compliant procedures, such as encrypting meetings. Currently, the HHS has not specified the importance of such a provision. However, the organization has deemed public-facing forms of communication–including Facebook Live, Twitch, and TikTok–as unacceptable for professional use. Again, the definitions of public-facing and private-facing technologies are ambiguous, as Facebook Messenger is considered acceptable, whereas Facebook Live is not, despite both technologies existing on open, publicly-accessible platforms. The HIPAA Security Rule and the FTC Act can provide guidance, but they cannot enforce specific definitions that hold significant influence over telemedicine practices. Therefore, it is important for there to be federal guidelines that distinguish public and private spaces to determine essential factors in privacy protection, such as Wi-Fi connections and the physical location of private meetings in telehealth.

According to the Office for Civil Rights under the US Department of HHS, 856 cases of breaches of unsecured protected health information have affected 500 or more consumers within the previous 24 months. Most of the breaches listed in a compiled archive by the Secretary are cases of hacking/identity theft (634 cases) that took place on unprotected network servers (398 cases).[46] The issue of protecting consumer medical information is of contemporary national concern as cases were reported across 50 states. Despite the pandemic's unprecedented nature, imposing lax privacy protections for ease of service can permanently reduce patient trust– even if healthcare providers eventually transition to more strict HIPAA compliant practices. On a broader scale, undeveloped telehealth laws and policies governing patient privacy and security leave healthcare practitioners to use their own interpretation of policies. A common repercussion of this event is that healthcare providers are left susceptible to vendors and other organizations looking to sell remediation services or "one-size-fits-all" risk management services, such as Tiversa from the *LabMD, Inc. v. FTC* court case. Medical professionals are consequently vulnerable to lawsuits for HIPAA, FTC, and HHS violations. In short, a lack of uniform, clear, and strict telehealth regulations makes it difficult for healthcare providers to protect patients' medical information and themselves from legal punishments.

C. ENFORCEMENT OF FEDERAL ANTITRUST LAWS

A key issue concerning patient protection and security lies with the involvement of adequately licensed and practicing physicians. Medical professionals are commonly and publicly regarded as trustworthy due to their role in societal well-being and care. Resultantly, concerning patient confidentiality, healthcare rests upon the establishment of trust between physicians and patients. This trust often arises from in-person, face-to-face interactions, as the patient can determine for themselves that their care is coming from a legitimate source. With telemedicine,

[46] U.S. Department of Health and Human Services. n.d., *Cases Currently Under Investigation*, Office for Civil Rights, https://ocrportal.hhs.gov/ocr/breach/breach_report.jsf.

unless the healthcare provider is well-known before or is publicly acclaimed, it may be challenging to identify whether the source is reliable or not. Such is the case with Teladoc Health, Inc., a multinational telemedicine company that provides virtual care and treatment, without in-person requirements.

In 2015, the Texas Board of Medicine adopted a policy requiring that treatment and prescriptions be assigned following documented face-to-face meetings, thereby prohibiting virtual or over-the-phone care. Teladoc immediately filed an antitrust lawsuit against the board, claiming that the company strives to champion access to high-quality healthcare for everyone. Moreover, Teladoc argued that as the Texas legislature does not supervise the board, its policy regarding in-person examinations violates federal antitrust laws. The Federal District Court agrees with this statement and supports the idea to keep the active supervision standard flexible and context-dependent, as concluded through the court case *NC. State Bd. of Dental Examiners v. FTC* from 2014. The *Teladoc, Inc. v. The Texas Medical Board* case was put on hold in 2016; however, during this time, the Texas Medical Board updated its licensing regulations allowing for virtual treatment without in-person requirements.[47] As a result, Teladoc dropped its antitrust lawsuit, citing that the new regulations will help healthcare providers explore direct-to-consumer care offerings, especially in the aftermath of Hurricane Harvey.

The COVID-19 pandemic presents a similar situation to those following natural disasters, where medical care and attention cannot readily reach patients, more specifically in an in-person form. The need to keep medicine accessible was and still is a valid reason to grow telemedicine, considering the state of emergency. While telemedicine companies and related agencies need to comply with lawful programs proactively, active supervision or in-person examinations may be flexible if supporting a legitimate public interest. Hence, the delicate balance between the virtual communication of medical information and patient security lies with regulatory compliance through HIPAA compliant processes, not platforms. Patient protection should never be compromised in any given situation, but the tool used to secure medical data need not be HIPAA or FTC compliant as long as the process prioritizes consumer safety, thereby meeting HIPAA and FTC standards.

IV. ANALYSIS AND DISCUSSION

With the advancement of telehealth services and telemedicine technologies, court rulings have become increasingly inapplicable for or overestimate current societal needs. The two major cases analyzed in the previous section, LabMD Inc. and Teladoc Inc., both address issues pertaining to data privacy and consumer protection. However, both cases took place during a period when telehealth services were not in high demand. Consequently, the rulings for both cases undermined the severity of situations where there is no option for in-person treatment or diagnosis. Teladoc dealt with this issue by addressing Hurricane Harvey, but even so, the natural disaster called for immediate medical attention only temporarily, which is not the case for the COVID-19 pandemic. There has always been a need for a strict and grounded federal policy to regulate telehealth practices in an extended public health crisis. Prior to the pandemic, that need was disregarded, as it was not of utmost importance in healthcare. Today, the necessity of consumer privacy is of high significance, although not urgent given the state of emergency put forth by the pandemic. Regardless, as healthcare practitioners and policymakers work towards

[47] *Teladoc, Inc v. Texas Med. Bd.*, 453 S.W.3d 606, 23 (5th Cir. 2015).

accessible healthcare in the future, they must consider regulating telehealth services under one system for easy, safe, and reliable consumer protection.

A. OPPORTUNITIES FOR TELEMEDICINE DURING THE COVID-19 PANDEMIC

The FTC Act and HIPAA safeguard medical information by preventing and seeking redress for unfair or deceptive practices concerning telehealth services. However, both laws are limited in authority as they do not enforce detailed data privacy or security regulations. The court cases from the previous section exemplified this idea. While the FTC can act in cases of inappropriate data security settings, it cannot enforce security safeguards for telehealth services. As mentioned before, the FTC Act only provides guidance and expectations for telehealth organizations and technology vendors, so it is unable to ensure protection for telehealth applications not covered by HIPAA. This issue was addressed in the ruling for *LabMd Inc., v. FTC* by encouraging movement for more legally enforceable regulations concerning data protection and privacy. The FTC expanded its authority to the medical field, but there was no development in robust policies that hold power on legal grounds. The need for strict regulations prior to the COVID-19 pandemic was minimal, but interest in and implementation of telemedicine services has since expanded. Demand for services led to the loosening of already soft policies, allowing telemedicine to be widely accessible but also more vulnerable to data breaching, medical identity theft, and consumer mistrust. There is no doubt that telemedicine brings healthcare and medical attention to remote or distanced populations, but this goal should not interfere with data security and privacy. The court case *LabMD Inc., v. FTC* demonstrated the consequences of companies working with unenforceable guidelines concerning data protection and storage. Moreover, the large number of annual cases across the United States relating to hacking or theft of medical information is telling of the scale and progressiveness of the issue.

There is a substantial need for a comprehensive federal policy on protecting and securing electronic medical information collected by telehealth technologies, stored by third parties, and used by healthcare providers and related companies. Such frameworks or processes should be consistent with HIPAA guidelines if the source of medical information storage or usage is not. This idea relates to the ruling for the *Teladoc Inc., v. The Texas Medical Board*, where the Federal District Court supported active supervision standards to be flexible and context-dependent as opposed to strictly HIPAA compliant. However, the ruling failed to address intricacies and deficiencies in security safeguards with medical communication across a virtual platform, such as application company demands for advertising or denying consumer access to medical information. Support for flexible policies is valid in the context of innovation and bolstering legitimate public interests, such as accessible healthcare for remote populations. However, in situations where the intended purpose of the telehealth technology or any third-party intervention is questionable, unidentifiable, or threatens consumer safety, such policies will be of little help unless there exists an extensive policy framework that includes details ignored or bypassed in more flexible policies.

It is expected that there will be challenges in creating such a picture for consumer protection and data security. For instance, a federal policy framework would need to support the flexibility of actions seeking public accessibility and convenience while strictly ensuring medical information is accessed in private spaces and shared in a HIPAA compliant manner across safe

virtual platforms. The practicality of such a dual-natured policy is questioned in situations where privacy control or security measures do not anticipate specific consumer preferences, such as user interest in using public social media platforms for medical care for convenience. These challenges may be addressed by referencing similar frameworks in other sectors, like banking or education, where digital access to bank accounts or transcripts is necessary for effective operations. Regardless, it is necessary that there is a clear, overarching policy for telehealth technologies, data communication, and information storage because otherwise, private companies and states have greater incentives for adopting their own regulations and protective methods. Medical professionals and healthcare professionals also put themselves at risk for lawsuits under flexible policies by making unfounded assumptions. To avoid this course of action for a field currently in full bloom, the FTC and the federal government must ultimately collaborate to ensure a reliable and secure environment for the telehealth ecosystem.

B. IMPLICATIONS FOR TELEMEDICINE IN A POST-PANDEMIC FUTURE

In response to the unprecedented changes brought about by the COVID-19 pandemic, the Office for Civil rights at the Department of Health and Human Services eased HIPAA violations with the understanding that telehealth services and related technologies will operate in the state of emergency in good faith. This notice was practical given that people were encouraged to stay at home and refrain from outside activities. In the situation in which a patient needs immediate medical attention from their home, privacy is not the most critical concern, and it would be considered appropriate for the patient to be on FaceTime with their physician if it meant they were receiving accessible and prompt care. These modifications are intended for the benefit of patients and practitioners, but such areas of change should be noted–not kept aside–so the long-term consequences of deregulations are identified and addressed as soon as possible to ensure a smooth and safe transition following the pandemic.

V. CONCLUSION

Telehealth services are an asset to the medical field by increasing the accessibility of healthcare and minimizing delays involved in medical procedures. The COVID-19 pandemic emphasizes the benefits of telehealth, hence why faulty or unclear policies should not undermine its success. Although they were established in light of the advancement of telemedicine technologies, regulations such as the FTC Act and HIPAA Security Rule fail to consider all details concerning the transfer, storage, and use of medical information. While the pandemic has prompted legislators to ease regulations, contradicting federal, state, and private security guidelines to increase accessibility has compromised patient security due to hacking, medical identity theft, and data breaching. Furthermore, these legal changes have led healthcare practitioners to develop their own protocols, though mostly ungrounded, and ultimately leading to threatening lawsuits. As a longstanding yet increasingly relevant field, telehealth services currently lack adequate regulations built upon a working legal structure. Nevertheless, its continued success in the COVID-19 pandemic raises concerns of prolonged deregulated practices–hence the argument for a comprehensive federal regulatory framework for telehealth practices. By implementing such a framework, the benefits of which outweigh the challenges of

developing and enforcing security and privacy regulations, healthcare providers can bolster trust with patients and support expanding applications for telemedicine in the future.

The Social and Legal Implications of Advanced Technology and Horizontal Business Organization in the 21st Century Workplace

Sydney Lester

Abstract.

This article primarily seeks to explore the current legal limitations in America surrounding privacy and safety in the 21st century workplace in light of the rise of advanced technology, the rapid pace of the economic system, and the subsequent mass shift towards horizontal business organization. By analyzing legislation and landmark court cases that define and set precedent for workers' rights— including citizens' right to solitude, the right to be free from harassment, and the right to a physically safe workplace— this article finds that there is a lack of adequate protections against intrusion of privacy for workers considering the demands of the horizontal business organizational model, arguing that ambiguity surrounding the right to privacy and advanced communicational technology increases the risk of psychological threats in the modern workplace. Furthermore, the article suggests that the lack of legal protections and the ensuing prevalence of psychological threats may contribute to the noted decline in workers' health, shift in workplace culture, and more intensely individualistic values in American culture. The article argues that since the intrusion of privacy has adverse effects on mental health, and mental and physical health have been proven to exist in a symbiotic relationship by emerging psychological and sociological research, the current legislation provides feeble protection against physical safety hazards in the modern workplace. This ultimately draws the conclusion that the failure of legislation to adjust at the same pace of the economic system has detrimental implications on all levels of society, and without intervention, may prove to have increasingly alarming ethical concerns for both the individual citizen and overarching American cultural norms.

I. INTRODUCTION

The rapid advancement of technology in the past two decades has been hugely influential in shaping American society as it exists in the modern day, and therefore, in shaping the institutions that characterize it. Beyond changing the ways people communicate, learn, participate in the political process, and understand the social landscape, some of the most critical— but perhaps overlooked— shifts are those that have occurred within the U.S. economic system. Although the more mechanical functions of the economic institution are most often thought of as being somewhat separate from individual personality, the emotional processes that drive human behavior, and the conceptualization of the self, its workings have an immense impact on all of these, and the very foundations of human interaction and socialization have been altered to keep up with an increasingly dynamic economic landscape.

Since the early 1970s, American politics, mirroring other developed societies across the world, has continually embraced neoliberal policies.[48] Although the American economy has always been structured in accordance with capitalist models, this push towards neoliberalism, coupled with the rise of consumerist culture and further compounded by rapid advancements in technology has created a highly competitive, fast-paced, predominantly market-oriented society made up of individuals whose personalities and identities reflect such an environment. Regarding the rise of increasingly advanced communication and data analysis technology, the ability to instantly share information requires competitive economic actors to respond just as quickly— and, in the words of Richard Sennett in his work, "The Corrosion of Character," creates a society-wide culture that is almost entirely focused on the "short term."[49]

Since the market conditions in any particular industry are not only increasingly competitive but also require an almost instantaneous response, the way by which small businesses and massive corporations alike organize themselves has shifted to adapt. In the past, the dominant business organizational model under the capitalist system was the hierarchical, or vertical model, which is characterized by top-down management strategy and relatively static (and thus, more secure) workplace expectations of individuals. However, under the current pressures to remain competitive in a dynamic economic environment, this method of organization does not lend itself to achieving the rapid response to the market shifts as required.

Thus, businesses across the nation have begun to restructure themselves and shift towards a more centralized, or flat, business organizational model, which, although arguably more effective in tackling the economic landscape as it functions in the present day, has both positive and negative implications for overarching cultural values, workers in knowledge-based (pertaining to the exchange or production of information) positions, and individuals as they exist outside of the workplace.[50]

Data suggests that there may be correlations between the level of workplace-induced stress, mental illness rates in American workers, and organizational strategy. In the last 3 decades, employees have experienced an 80% increase in work-related stress levels (increasing

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[48] Witold Henisz, Bennet A. Zelner, and Mauro F. Guillén *The Worldwide Diffusion of Market-Oriented Infrastructure Reform, 1977-1999, American Sociological Review* 70, no. 6 (2005).

[49] Richard Sennet. *The Corrosion of Character: The Personal Consequences of Work in the New Capitalism*. W.W. Norton (2015) .

[50] Cole Raymond, Amy Oliver, and Aiste Blaviesciunaite, *The Changing Nature of Workplace Culture*, Facilities, Emerald Group Publishing Limited. 787 (2014).

about 2% each passing year)[51] and the rate of workers seeking help for mental illness has risen from 16% in 1999 to 44.8% in 2018.[52] At the same time, horizontal business organization has become increasingly more popular as both technology and the market economy has evolved. Companies, especially those whose employees are mostly knowledge-based (including Apple, Google, McKinsey, Patagonia, Zappos, and Facebook) and who have huge presences in their industry, have begun to adopt partially or completely flat organization to keep up with modern economic conditions, with many smaller companies following suit. It appears that as less and less people perform task-based work, technology advances, the economy quickens, and companies adjust their organizational strategy to best fit the contemporary world; workers' stress levels, and subsequently, their mental health, suffer. Given, workplace organization is certainly not the only factor in the rising stress levels and mental illness rates in American workers— cultural perspectives on mental illness, technology, family tradition, unemployment rates, the economic conditions, and, of course, the COVID-19 pandemic also play a role— but the shift in workplace organization appears to mirror each of these, and certainly has the potential to contribute to the issue.

In the words of Gary Hamel, "You cannot build a company that is fit for the future without building one that is fit for human beings," and the widespread adoption of horizontal business organization without legal intervention to set bounds on the newly challenged rights of workers may prove to exemplify this sentiment. The progression of business organization as the economy evolves is inevitable; however, the law must progress alongside it if we are to remain within the bounds of what American culture considers to be reasonable. Thus, the importance of such an issue has been established, and questions of legality regarding the imposition of corporations on workers' rights arise. The rising popularity of the horizontal business model has pushed the limits of employee rights to privacy and begs the reexamination of laws that distinguish between appropriate expectations of an individual's personal, more abstract contributions to their workplace, such as to the degree an employer is obligated to comply with employer demands of increased flexibility, decreased socialization, and ultimately, the acceptable level of corporate intrusion on the personal lives of workers as they exist outside their now far more convoluted definition of the workplace.

These effects, born out of political motivation, increasingly advanced technology, and the subsequent cultural and economic shifts that are redefining American institutions across the board, naturally give rise to questions regarding the extent to what is legally considered an acceptable degree of workplace imposition on the personal lives of workers. Especially relevant to knowledge-based workers following the COVID-19 pandemic and the expedited adoption of mobile technology as an essential component to completing work-related business in a far more flexible definition of the "office," legal cases pursuing answers to the question of where the limits lie in blurring the historically separate conceptions of "workplace business" versus "personal business" have become increasingly common. Although policies have been put in place in attempts to mitigate the relationship between the individual as a whole and the individual's identity as a "worker" in corporate America, the shift in perception that the

[51] American Psychological Association, *Stress in America 2020: A National Mental Health Crisis* (2020).
[52] Saloni Dattani, Hannah Ritchie, and Max Roser, *Mental Health*, Our World in Data (2021).

"workplace" may now be somewhat independent of a designated physical location, and the somewhat convoluted nature of the issue continually requires reinvestigation.

Therefore, this article seeks to investigate the legal implications of the shift in the dominant business model under American capitalism and outline landmark legal cases regarding violations of employee rights to privacy and safe working conditions that have been presented to the American court system in recent years. By examining privacy and workplace safety laws, it first aims to highlight trends in business organization strategy as they have evolved in response to the shifting economic landscape. Next, it looks to connect legislation and landmark legal cases that have surrounded and defined the issue as it has developed over time to broader shifts in individual personality, workplace culture, and the overarching cultural values and structuration of modern American society. Finally, it seeks to argue that the American judicial system's failure to progress alongside the economic system has a detrimental impact on the individual, on businesses, and on the larger societal structure as a whole.

II. BACKGROUND ON ORGANIZATIONAL STRUCTURE AND LABOR LAWS IN THE U.S.

A. THE IMPORTANCE OF ORGANIZATIONAL STRUCTURE IN BUSINESSES AND THE LOOMING SOCIOLOGICAL IMPLICATIONS

In America, the most prevalent example of formal structure in business organizational strategy has historically been vertical organization, specifically, in the form of bureaucracies. Beginning with Ford's popularization of the assembly line, vertical organization has long been seen as the most efficient, and thus, most socially acceptable, or "legitimate," form of organization. Vertical organization provides a more widespread sense of stability for workers and managers alike; top-down management styles are characterized by standardization, fixed job descriptions with little ambiguity as to who is responsible for what specific, and often rather narrow, role within the company. Furthermore, under vertical organizational structure, the more clear cut expectations of workers allows for more opportunities for unionization and the protections that union membership provides. Modern technology, however, and the subsequent impacts that instant communication has had on the market environment, demands further dynamicity and agility than such stiff formal structure allows. Thus, the emergence of the horizontal business organizational strategy has become increasingly mainstream, and processes of isomorphism[53] have left many businesses with little choice but to adopt the practice.

The horizontal method of organization is characterized by decentralized management, broadly defined job descriptions, employee flexibility, and emphasis on "teamwork"[54] style collaboration with coworkers. This type of organization certainly has its benefits; flat organization allows for increased flexibility, faster reaction times, better communication, and more opportunity for creativity. With the onset of the COVID-19 pandemic and the need for more remote means of producing work, horizontal organization provided the flexibility required to make a smooth transition to the virtual workspace. However, it also has the potential to be detrimental to the quality of the work produced, as well as to the social relationships of workers.

[53] Walter W. Powell and Paul J. DiMaggio, *The New Institutionalism in Organizational Analysis*, 48 American Sociological Review 147-160 (1991).

[54] *NUMMI (2010)*, This American Life (2021).

"Broadly defined job descriptions," and "employee flexibility" often equates to workers being bombarded constantly with business related communications outside of the workplace, being expected to move within or between companies, and take on additional work that may be outside of their realm of specialization— which not only adds to the stress of being expected to manage and complete quantitatively *more* work, but also is stressful in that each employee is, to a degree, expected to be knowledgeable across fields, rather than just their own. The stress resulting from this is compounded by the lack of long-term social connections that comes as a byproduct of working under temporary circumstances in a temporary environment. Due to a lack of job security and emphasis on flexibility, people are forced to move physical locations or switch "teams" more frequently, disrupting the continuously infantile social networks that exist both within the company and outside of the workplace. Naturally, the quality of work produced by such individuals is also negatively affected, as the combination of stressed employees with the expectation of specialization in a diverse range of fields results, in practice, not in employees' increased knowledgeability, as had been the goal; this expectation more often results in decreased employee motivation, poor morale, and a company-wide lack of legitimate expertise in specific areas, with relative mediocrity in many.

B. RELEVANT HISTORY OF LABOR LAWS IN THE U.S.

Historically, labor laws in the U.S. have evolved alongside ongoing civil rights movements, resulting in the social and legal landscapes that characterize American society in the present day. In the early 1900s, labor laws and working conditions in America were objectively poor. By 1938, however, the Fair Labor Standards Act (FLSA) was passed and more permanent federal protections were granted to workers, including the limitation of child labor, the establishment of a federal minimum wage, and the mandating of overtime pay. This legal document defines "work," as "the performance of services for which remuneration is payable," with such work "need[ing] not be limited only to services performed in an employer-employee relationship; individuals in self-employment also may be considered to be performing "work." The "work" performed in self-employment must, however, be bona fide "work;" it does not, for example, include unremunerative work performed as a volunteer."[55]

Following the passage of FLSA, labor laws continued to pass, including those relevant to employee privacy and safety in the workplace. Notions of citizens' right "to be let alone" (non-exclusive to the workplace) began in the late 1800s. Citizens' rights to privacy began to receive greater recognition in business law affairs with *Pavesich v New England Life Insurance Co.,*[56] where the Georgia Supreme Court recognized the right of privacy "as derived from natural law where the defendant's general agent had, without permission, used Pavesich's photograph and name to advertise its policies."[57] Clarity surrounding privacy laws in employment continued to increase with the 1960 publication of William Prosser's "Privacy."[58] Here, Prosser importantly defines "Intrusion upon Seclusion" as "one who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns [without consent],"

[55] U.S. Department of Labor, *Definition of "Work" for Purposes of Section 3304(a)(7) of the Federal Unemployment Tax Act* (1992).

[56] 171 NY 538, 64 NE 442 (1902).

[57] Richard M. Howe, *Minding Your Business: Employer Liability for Invasion of Privacy,* 7 no. 2 The Labor Lawyer 318 (1991).

[58] Prosser, "Privacy" 48 Cal L Rev 383 (1960).

deeming them, "subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."[59] From that point on, the issue appeared in the courtroom in the context of employer-employee relationships numerous times, as the definitions of a "private place," "consent," and "highly offensive" were deliberated. Ultimately, the relevant cases[60] reveal a developing trend whereby "an employer can become more intrusive as the importance of the employer's interest and the relevance of the information sought increases."[61] Also relevant to workers' privacy rights was the passing of the Americans with Disabilities Act of 1990, which describes employee rights to medical privacy and confidentiality and requires non-discrimination and accommodation based on disability.

Laws protecting workers from a hazardous workplace also continued to evolve in an attempt to reduce the number of worker deaths and injuries. Most importantly, the Occupational Safety and Health Act of 1971 was passed, which defined an employer as "any person engaged in a business affecting commerce who has employees" and required that employers keep "workplaces free from recognized hazards likely to cause death or serious physical injury."[62] This legislation initially mainly targeted physical laborers' rights (such as those working in factories, mines, construction, etc.), and aimed to ensure that machinery and the environment the workers were exposed to were not known to be dangerous. Although as society has progressed and the number of citizens working in a field requiring physical labor has declined, the courts have begun to recognize that the threat of an "unsafe workplace" that may lead to serious physical consequences extends to mental health as well. While OSHA's protections against mental health hazards present in the workplace are limited due to the specification of "physical harm," and it is difficult to prove in a court of law that an employee's physical ailments correlate directly to the work environment, "OSHA has developed a policy entitled Enforcement Procedures and Scheduling for Occupational Exposure to Workplace Violence, which provides that an employee who has experienced acts of workplace violence, "or becomes aware of *threats, intimidation, or other indicators showing that the potential for violence in the workplace exists,*" would have cause to put his employer on notice of the risk of workplace violence."[63] Although OSHA does not yet formally recognize emotional or psychological abuse of employees, "It may be that soon courts include the causes of psychological or emotional injuries in the mandate of workplaces to be "free from recognized hazards" in the interpretation of the OSHA General Duty Clause,"[64] with the push from social movements to recognize the legitimate threat that psychological or emotional abuse poses to workers.

C. U.S. LABOR LAWS IN THE 21ST CENTURY

In 2021, many employee rights are still defined by the Fair Labor Standards Act (FLSA), with legal limits on working remaining relatively static since its passing. Hourly employees "may not be employed for more than 40 hours in a 168 hour workweek without receiving at least

[59] Prosser, "Privacy"

[60] *Venars v Young*, 539 F2d 969 (3d Cir 1976). See also, *Love v Southern Bell* Tel. & Tel. Co., 263 So2d 460 (La App 1972), *Kobeck v Nabisco*, Inc., 166 Ga App 652, 305 SE2d 183 (1983).

[61] Howe, *Minding* 324

[62] OSHA General Duty Clause, Section 5(a)(1) of the Occupational Safety and Health Act

[63] *Workplace Violence*, Occupational Safety and Health Administration

[64] Ashley Blachford, *Does the OSHA General Duty Clause Encompass Psychological or Emotional Injury?* Journal of Urgent Care Medicine, (2020).

one and one-half times their regular rates of pay for the overtime hours," although there is no defined limit for the number of overtime hours a person can legally work. For adult FLSA-exempt workers, there is no limit to the number of hours a person can work, and an employer is not legally obligated to pay their employee overtime after they have worked 40 hours within the workweek.[65]

Furthermore, although unionized or government workers have more job security than the average worker, most individuals are hired, or fired, "at will," meaning that the employer "can terminate an employee at any time for any reason, except an illegal one, or for no reason without incurring legal liability. Likewise, an employee is free to leave a job at any time for any or no reason with no adverse legal consequences."[66]

Under FLSA, those who are "employed," by another, as is the case in the following court cases, are "suffered or *permitted* to work" by their employer, which means that even if an employee voluntarily takes on additional workplace responsibilities—either in attempt to remain in the good graces of their employer, or at the "suggestion" or workplace authority—they must be paid for their time. Therefore, unless the employer "did not know about and had no reason to know about" the work, or the employee is "completely relieved" of their duties, the employee is entitled to compensation.[67] "Work" also includes work performed at home, an important legal distinction due to "increasing frequency of telework and remote work arrangements… The Bureau of Labor Statistics estimated in 2021 that roughly 21 percent of working Americans performed some work at home on an average day."[68]

Specifically important in the context of the shifts in business organizational models are current laws surrounding workers' rights to privacy and rights to be provided with working conditions that are free of known dangers.[69] U.S. citizens in almost all 50 states are still entitled to the right to privacy,[70] and all citizens are entitled to the right to not to have one's personal matters disclosed or publicized and the right to be left alone. Federal law entitles citizens to keep their religion, home, and possessions (including their digital possessions) private. Civil law may protect individual privacy rights under the pretenses of the intrusion of solitude, appropriation, public disclosure of private facts, and false light.[71] The right to privacy extends into employment, and employers may violate the rights of their employees by failing to keep medical information confidential or by "intruding into an employee's private activities in an outrageous way or in a way that causes mental suffering, shame, or humiliation to a person of ordinary sensibilities."[72]

Furthermore, modern workers are still entitled to a workplace that is free from known safety hazards, although, "Despite tort law and emerging workplace policies validating how [some workplace situations] can lead to emotional and psychological harm, currently the OSHA

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[65] "Overtime Pay," United States Department of Labor, accessed December 6, 2021, https://www.dol.gov/agencies/whd/overtime.

[66] Michelle Larson-Krieg & Jeanne Mejeur, *At-Will Employment* https://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx. (2021)

[67] *Kellar v. Summit Seating Inc.*, 664 F.3d 169, 177 7th Cir. 2011

[68] United States Department of Labor*, Wage and Hour Division*, https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab_2020_5.pdf. (2020)

[69] Occupational Health and Safety Administration, *Workers' Right,* https://www.osha.gov, 3 (1970).

[70] Eli A Meltz, *No Harm, No Foul? 'Attempted' Invasion of Privacy and the Tort of Intrusion Upon Seclusion*, Fordham Law Review https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5122&context=flr (2015).

[71] *Restatement* (Second) of Torts §§ 652B-652E (1977).

[72] *Restatement*

General Duty Clause imposes a responsibility only for employers to provide a workplace free of 'death and serious physical injury.'"[73] However, present OSHA and ADA laws do recognize mental illness as a disability for which workers are entitled to take medical leave, and there are laws in place to protect workers from termination or discrimination provided that the employee " voluntarily provides the employer with an opinion from a physician or other licensed health care professional."[74]

D. ETHICS VERSUS LAW

Although FLSA has created a solid foundation for establishing worker's rights, the modern economic landscape and its driving of the shift towards horizontal formal structure in business organization begs further legal examination of legal limitations that are necessary to protect the well-being of employed Americans. Naturally, the recent shift in business organizational models has some inherent ethical concerns, but, most often, legal affairs are kept separate from defining "ethical behavior." Therefore, an employer breaking the socially upheld ethical standards that define decent treatment of workers does not necessarily mean that that individual is breaking the law.

Horizontal business organizational models tend to evoke questionable or illegal acts against workers in somewhat non-traditional ways, some of which are difficult to prove in a court of law. Workers are expected to take on additional responsibilities, forgo processes of socialization vital to well-being, and accommodate for a more dynamic definition of the "workspace" (referring to geographic location, team within the company, and in-person vs. remote places of work) to remain secure in their "at-will" positions, and some labor laws intended to protect employees from harm or abuse fall short of doing so in light of the rapid pace of the digitized markets. Many of the questions of legality surrounding the horizontal business model teeter on the edge of being purely a matter of ethics, but the impacts of the "short-term" lifestyle forced upon employees have implications for the workers' right to privacy and right to working conditions free from known dangers. These issues are further complicated with the evolving definitions of both "privacy" and "working conditions" due to advanced technology, defining what qualifies as a legitimate threat to mental health in light of modern psychological research, and new conceptions of the workplace.

III. LANDMARK LEGAL DECISIONS: PROMINENT ISSUES WITH HORIZONTAL BUSINESS ORGANIZATIONAL STRUCTURE

A. WORKER RIGHTS TO PRIVACY

Questions of workers' right to privacy are relevant considering the shift to horizontal business organization due to this organizational strategy's tendency to enable the increased occurrences of workplace matters being inserted into the personal lives of workers. Combined with electronic communication, the employee has little escape from professional affairs, and their sense of privacy may be violated. However, although violating an individual's sense of

[73] Occupational Health and Safety Administration, *Workers Rights* (1970).

[74] Occupational Safety and Health Administration, *Mental Health Condition/Work Relationship*, https://www.osha.gov/taxonomy/term/999680049.

privacy may break ethical conduct standards, the current legislation provides very little legal protection against such intrusions.

For an employee to claim that their employer has violated their right to privacy on the basis of "intrusion of solitude," the employer must have intruded on their personal affairs in a way that is deemed "highly offensive" to a reasonable person. The precedent for an intrusion to qualify as such was set in *Phillips v Smalley Maintenance Services*, whereby Phillips alleged that her manager, the owner of Smalley Maintenance Services, "called [her] into his office, locked the door, and questioned her about her sex life. He also insisted that she engage in sexual acts with him and threatened to fire her. She refused to answer his questions or submit to his propositions. This occurred two to three times a week for three months, after which time she was fired."[75] The jury ultimately "found that Smalley had wrongfully intruded into Phillips's private activities so as to cause outrage or mental suffering, shame, or humiliation to a person of ordinary sensibilities."[76] Therefore, this case defined the nature of what is considered "highly offensive" to a reasonable person, and following cases of intrusion of solitude in a highly offensive way are decided based on such a definition.

The employer must have also intruded without consent, which although is argued to be inherent if the act were to be considered "highly offensive," is somewhat nuanced. Another case, *Moffett v Gene B. Glich Co.,* set precedent for what is considered "employee consent" for an employer's intrusion of their right to privacy.[77] In this case, Moffett alleged that her employer violated her right to privacy on the basis that they interfered with her private relationships. However, the jury dismissed this claim, ruling that she had "waived her right to privacy with respect to her personal relationship... by discussing it in detail with her coworkers."[78] Thus, the expectation of the nature of what is considered to be employee consent is set.

There are also very few digital privacy laws that protect employees from digital surveillance by their employers in the case of remote work. According to Ifeoma Ajunwa of Cornell University's Industrial and Labor Relations school, "... employers have carte blanche in terms of what they can do regarding surveillance and worker monitoring."[79] Federal law permits employers to use Bossware,[80] and monitor the use of employer-provided equipment and computer networks, with few limitations other than those outlined in the ADA regarding medical and genetic information, as well as those concerned with unionization. In the present day, it remains unclear as to the extent employers can monitor what workers do on computers or smartphones they own but are using for work.[81]

Thus, unless employers are deemed to be harassing their employee, it is legal to digitally contact employees while they are in a "private place" (home, if the employee is remote, is not

[75] Howe, *Minding* 321

[76] *"Phillips v. Smalley Maintenance Services, Inc,"* Supreme Court of Alabama https://law.justia.com/cases/alabama/supreme-court/1983/435-so-2d-705-1.html (1983).

[77] *Moffett v Gene B. Glich Co.,* 621 F Supp at 283 (N D Ind 1985).

[78] *Moffett v. Gene B. Glick Co., Inc.*, 621 F. Supp. 244 (N.D. Ind. 1985), Justia Law, https://law.justia.com/cases/federal/district-courts/FSupp/621/244/1368088/.

[79] Ajunwa Ifeoma, *Some Companies Are Turning to Tracking Technologies to Ensure Safe Reopening,* NPR (2020).

[80] Zhou Enid, *Workplace Privacy,* Electronic Privacy Information Center, https://epic.org/issues/data-protection/workplace-privacy/ (2021).

[81] Zhou, *Privacy*

considered a "private space,")[82] so long as they do not violate digital privacy laws in a "highly offensive" way that very clearly and explicitly violates consent (which, due to the precedent of consent and horizontal business structures' lack of specific job descriptions, would be difficult to prove in a court of law). Even if the employer is suggesting/requiring employees to do excessive work at home, if the employee is FLSA-exempt and does not claim that they suffer from work-related mental health issues from their employers subjecting them to intentional emotional distress, there is no limit to the number of hours that may be worked. Because of the nature of "at-will" employment, most workers would be barred from filing for wrongful termination on the basis that their employer filed them for refusing contact outside of work (granted that the employer does so legally), or for unfair treatment, should the additional responsibilities suggested or required be excessive so long as they are fairly compensated for. Therefore, it would be very difficult to protect oneself from the stress resulting from employers requiring excessive amounts of work to be done even outside of the workplace.

B. UNSAFE WORKING CONDITIONS

Other legal issues that have become prevalent with the continual integration of horizontal business organization into the mainstream are dependent on the legal system's increased, but still limited, acknowledgment of the connection between workplace stressors and the physical and emotional impact of mental health issues on individuals. Left unlimited, such organization provides increased chances of a workplace being immensely stressful, beyond normal or reasonable expectations, due to increased responsibilities of employees and lack of stability. Such an environment, from an ethical or medical perspective, may be deemed psychologically unsafe, but because widespread pressure of this nature is a relatively modern issue, the question of whether OSHA workplace safety regulations and ADA anti-discrimination mandates extend to adequately protect employees from unreasonable workplace stressors and work-related mental health issues remains despite the medical fields' recognition that workplace stress contributes to mental illness and subsequent physical ailments.

One of the most pressing legal questions at hand is that horizontal organization often requires workers to comply with "unrealistic expectations,"[83] which "can be a tremendous source of stress… leav[ing] an employee physically and emotionally drained."[84] There are two ways by which salaried workers can sue their employer/coworker for inflicting too much stress upon them: they can file for "intentional infliction of emotional distress" or "negligent infliction of emotional distress," with cases of being overworked to the point of legitimate harm likely falling under the latter. Because there is currently no legislation that limits the amount of work or number of hours that an employer can assign to an FLSA-exempt worker, to file and win an emotional distress case of this nature, the employer must have had direct knowledge of the conduct in question, knowledge that the conduct was harmful, and have "failed to take proper steps to remedy the situation."[85] If these conditions are met, "emotional distress damages can cover a range of harms, including diagnosed psychiatric conditions (such as depression or

[82] "NOTICE OF INTENTION TO REPEAL AND REENACT ARTICLE 89 OF THE NEW YORK CITY HEALTH CODE," § (2008).
[83] Rajgopal, *Mental well-being*
[84] Rajgopal, *Mental well-being*
[85] Occupational Safety and Health Act, *Workers' Right to Refuse Dangerous Work* (1970).

anxiety disorder),"[86] and Title VII of the Civil Rights Act of 1964 allows the victim to receive compensation… in [the case of] emotional distress damages.[87]

One legal case, *Matter of Nino Romano v Commissioner of Labor*, provides insight into where the law currently stands on such an issue. In this 2006 case, Nino Romano, an employee at a substance abuse residential treatment center, "appeal[ed] from a decision of the Unemployment Insurance Appeal Board… which ruled that claimant was disqualified from receiving unemployment insurance benefits because he voluntarily left his employment without good cause."[88]

In other words, Romano ultimately resigned from his position but believed that due to his resignation (which he cited as being for "personal and professional reasons") being a result of his employer's overworking him (inflicting intentional emotional distress), the Commissioner of Labor's denial of unemployment benefits was unlawful. However, Romano's claims of his employer's overworking him to the point of resignation did not hold up in court, and it was ultimately decided that "'dissatisfaction with one's employment, including assertions of being overworked, does not constitute good cause for leaving employment.'"[89] Therefore, the case was dismissed and Romano did not receive the unemployment benefits he was pursuing.

This case proves the difficulty of suing employers on the grounds of stress violating OSHA mandates that employers have the right to a safe work environment. In such cases, not only is evidence of physical harm difficult to prove, it is clear that the law does not constitute being "overworked," even in cases of it meriting "medical care for emotional and physical ailments engendered by work-related stress,"[90] as a legitimate threat to employee physical safety. The most critical aspect of such a ruling was the court's decision that Romano left *without good cause*, as it implies that excess stress, even if inflicted knowingly or intentionally by an employer, is not a breach of "emotional distress" laws that acknowledge the impact of mental health on physical health.

On a similar note, another potentially harmful aspect of horizontal organization is the tendency for such a structure to require frequent changes for employees, which again, would likely be pursued in the courts inflicting "emotional distress." Frequent change in workplace cohorts, excessive travel, "and too much time away from family" all impact individuals' ability to form long term connections, and employees may miss out on building strong social ties and relationships critical to overall well-being. Current legislation provides little protection against such harms, and unless there is proof that an employee suffered a "psychological injury" that is proven to be solely a product of factors in the workplace, there are few legal routes to take in protesting such changes. However, if an employee is able to prove that they were subject to a significant "psychological injury" in the workplace, they may be entitled to workers compensation and protected by anti-discriminatory laws.

In short, pursuing legal justice for cases of a "psychologically unsafe" workplace (in cases where there are no direct physical threats or tangible evidence of emotional abuse) is very difficult, simply due to the discrete and variable nature of the human mind.

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[86] Occupational Safety and Health Act, *Workers' Right to Refuse Dangerous Work* (1970).

[87] U.S. Equal Employment Opportunity *Title VII of the Civil Rights Act of 1964*, Commission, https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964.

[88] *Matter of Romano v Commissioner of Labor* 2006 NY Slip Op 05196 Appellate Division, Third Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431 (2006).

[89] *Matter of Romano v Commissioner of Labor* (2006).

[90] *Matter of Romano v Commissioner of Labor* (2006).

Although overworking and depriving employees of a healthy social environment is, by most standards, unethical, the legal system, at this point, is likely to require more explicit evidence than many situations allow. Although in cases where diagnosed mental health issues qualify as "disabilities" under ADA and OSHA laws workers are protected against discrimination and may receive compensation, targeting the source of the mental illness is still largely ignored by American courts. However, due to the specification that the workplace environment must be a threat to *physical* health— and the lack of concrete evidence linking specific psychological stressors to physical afflictions— in cases where employers inflict "emotional distress" upon their employees by simply stressing them out to the point of psychological ruin, there are very few legal protections.

IV. SOCIAL AND LEGAL IMPLICATIONS

A. THE SOCIAL IMPACT OF HORIZONTAL ORGANIZATION

Ultimately, the implications of such limited legal protections against both intrusions of privacy and the impact of work-related stress on mental and physical health for employees have the potential to be severely detrimental to the individual, the businesses themselves, and American culture as a whole. If the court system does not begin to recognize that psychological needs are connected to, and equally as deserving of protection as physical needs, the shift towards horizontal structure may prove to be devastating on both a micro and macro level. However, there are difficulties in laying down black and white limits on such ambiguous psychological processes— tangible proof of harm is hard to come by, the seriousness of mental health is subjective according to culture and age, and the field of psychology is still largely based on theory.

For the individual, the shift in the economic system is, put simply, immensely stressful. Although the workplace is, regardless of the business organizational strategy, inarguably and inherently stressful at times, horizontal organization intensifies this on a national level, to the point of physical harm. Aside from the more clinical implications of high stress levels on physical health, Jourad's, "Some Psychological Aspects of Privacy," asserts that intrusions of privacy are destructive to the individual's self-concept, and having a sense of privacy provides a crucial release from the socially imposed pressures to conform, as; "The experience of psychotherapists and of students of personality growth has shown that people maintain themselves in physical health and in psychological and spiritual well-being when they have a "private place," some locus that is inviolable by others except at the person's express invitation." Privacy allows individuals to "do or be as he likes and feels. He can utter, express, and act in ways that disclose his being-for-himself, and he does not need to fear external sanctions. Nor does he feel guilt for the discrepancy between the way he appears in public and the way he *is* in private."[91] The intrusive nature of technology, combined with the need for instantaneous responses to the market environment and the subsequent lack of opportunity to build trusting relationships and strong social ties (leading to feelings of instability and isolation) thus, may play a role in contributing to the 13% increase in the prevalence of mental health disorders observed

[91] Sidney M Jourard, *Some Psychological Aspects of Privacy*, Law and Contemporary Problems, Duke Law Research (1966).

over the last decade.[92] Despite a longitudinal study, conducted from 2005-2019, finding "that higher levels of workplace stress were associated with an increased risk of metabolic syndrome, a precursor of coronary heart disease… Workplace stress has… been indirectly linked to employees' health through the experience of stress being associated with greater engagement in negative health behaviours such as tobacco smoking, inadequate diet, insufficient physical activity, and alcohol use"[93] establishing a connection between workplace-induced stress and physical health, OSHA laws simply have not evolved quickly enough, and American workers remain unprotected against the looming dangers of intensely stressful work environments.

Stress on the individual, then, in turn, results in implications for the overarching productivity of businesses. Employees experiencing high levels of stress were "19% less productive than employees who did not report experiencing stress," due to lack of motivation, increased likelihood of mental disorder, and burnout.[94] A 2017 study conducted by Mental Health America estimated that businesses in America lost a combined 500 billion dollars in profit due to decreased employee productivity.[95] In addition to this, the formation of social trust is also, on a larger scale, necessary for corporations' success from an economic perspective. Just as trust in an interpersonal relationship between individuals allows for peace of mind in that the other party will in some way reciprocate, trust between companies and clients or partners is also critical for reducing the "transaction costs," of interaction, which refers to "anything that makes it costly to go through the process of a transaction that does not benefit either buyer or seller."[96] Thus, trust relationships between larger organizations, built through repeated contact with the same individual or group, allow not only for lower monetary spending but also for corporations' confidence and comfortability that the other party will reciprocate and act with goodwill during transactions. However, the flat organizational business model and the resulting "short-term" conditions produced make the formation of strong social bonds and trust far more difficult to achieve. Together, the cost of decreased productivity and higher transaction costs due to the shift in organization may prove to be as detrimental to market actors as it is to the individual.

B. SUGGESTIONS FOR LEGAL INTERVENTION

There are several adaptations to privacy laws and OSHA regulations that American courts could incorporate into legislation in order to better protect workers. Regarding violations of employee privacy and overworking, it could be mandated that employees are entitled to a certain amount of time whereby employees are not allowed to contact them or require their response while at home, including via digital communication. Laws limiting out-of-office and after-hour contact have already been implemented in France, Italy, and Spain. Other developed European nations are following suit, including the U.K.'s push for citizens' "right to disconnect." In Australia, several unions have negotiated the right to ignore workplace communications

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[92] World Health Organization *Mental Health*, https://www.who.int/westernpacific/health-topics/mental-health.

[93] Tamara Street et al. *Employee Stress, Reduced Productivity, and Interest in a Workplace Health Program: A Case Study from the Australian Mining Industry.* 16 International Journal of Environmental Research and Public Health, (2018)

[94] Street et al. *Employee Stress*

[95] Employee Mental Health Survey Questions *Mind The Workplace,* https://www.hospitalaz.com/employee-mental-health-survey-questions/ (2017).

[96] Gabriel Rossman, *Trust* (2021).

outside of emergencies and normal work hours. Before pursuing citizens' "right to disconnect," however, the U.S. judicial system must first acknowledge the legitimate emotional distress that results from invasion of privacy, overworking, and lack of social stability— and then, acknowledge the link between workplace stressors and physical injury. After doing so, legislation should then explicitly incorporate definitions of psychological injury and emotional distress that are appropriate for the contemporary environment, therefore extending OSHA protections in a way that mandates both a physically and psychologically safe workplace. Ultimately, American courts should follow the lead of the European parliament, and pay attention to the "always-on" culture that is disrupting the work-life balance of citizens to the point of disrupting society as a whole. In the modern day, stress and technology are inevitable; however, modern issues such as these require an ongoing legal reexamination of where we, as a democratic society, are to draw the line concerning the extent to which the workplace is to mesh with the identity of the individual.

V. CONCLUSION

In sum, the recent shifts in the U.S.'s economic landscape are simultaneously both a product of and a contributing factor to the large-scale shifts that have altered the fundamental institutions of America. Together, the modern economic, political, and social institutions are forcing many workers into living stressful lives full of continual "short-term" situations, and such a drastic shift in perspective and lifestyle is proving to be detrimental to the health of the nation as a whole. Born out of the push towards neoliberalism in the 1970s, and expedited by the rise of advanced technology, the economic institution has evolved to require instantaneous responses to the market, and businesses in the U.S. have been forced to adapt to the hyper-competitive, fast-paced environment. However, the rapid adoption of these adaptations have pushed the boundaries of the widely-held ethical standards of Americans— and, although as established, the judicial system is not a means of upholding ethical values, the courts must lay the boundaries that interpret and protect the rights of the 21st century worker, faced with unprecedented questions of their right to privacy and their right to a safe work environment.

The rising popularity of the horizontal business model is at the center of such questions, largely due to the intrusive nature of such a structure and the effects of such intrusions on the psychological wellbeing of individuals. The economic landscape and the subsequent emergence of horizontal business organization have forced the need for legal reexamination of citizen rights, but the current legislation seems to lack the contemporary adjustments necessary to protect the privacy and health of the American people. Although questions of employees' rights to solitude, overworking, and emotional distress are being continually challenged in the courts, the modern worker has few legal protections against the psychological and physical threat that incessant stress poses on the individual.

Worker privacy laws are outdated in that they fail to take digital communications into account, and although there are basic privacy laws that are designed to protect an individual's right to solitude, the courts are unclear in defining shifting conceptions of "private spaces," and how privacy rights apply to digital communications and virtual workspaces. The main issue of the court's lack of clarity surrounding the worker's right to privacy is that constant communication from the workplace further blurs the boundary between "personal business" and "workplace business" and hinders the individual's ability to detach themselves from social

pressures demanding conformity and workplace stressors. The courts have, however, set precedent for claims of intrusion of solitude needing to qualify as both "highly offensive," and "without consent," although such rulings seem not to account for the degree of intrusion that many workers remain vulnerable to.

However, equally as important as limiting the bounds of the workplace is reexamining the cultural forces that allow an institution such as this to thrive. U.S. laws are, by design, isolated from culturally imposed ethical norms, yet, as society continually progresses towards embracing a more liberal definition of civil rights, there is a natural coinciding of the two. Regarding the discussion at hand, it could be expected that as citizens as a whole begin to realize the negative impacts of "always on" culture, they will begin to push back on workplace circumstances deemed "unethical" in the courts. In due time, there will likely be a significant uptick in court cases connecting workplace stressors and physical health, and, perhaps, adjustments made to pre-existing laws (such as OSHA) to account for both a) the connection between mental and physical health, and b) the equal importance of mental health and physical health to the overall well-being of the individual. However, if the issue is not continually brought to the attention of legislators, the individual, workplace culture, and American culture risks straying further away from a necessary sense of security: in one's self, in one's economic standing, and in the stability that group membership provides. Should this be the case, such shifts away from present normative conceptions of ethical treatment, in turn, will almost certainly limit the legislative landscape and perpetuate a harmful cultural environment on all levels of society. Therefore, this issue ultimately lies at an intersection between culture and law— and it is the responsibility of citizens, as they see fit, to continually push legislators to reexamine citizen rights utilizing an appropriately contemporary lens.

Nike Entering the Metaverse

Kashish Makker

Abstract.

Nike, a sportswear and fashion company, has recently acquired RTKFT (pronounced Artifact), a digital design company specializing in the metaverse, demonstrating the increasing prevalence of incorporating digital products in unexpected industry sectors.[97] By comparing past acquisitions of various companies inside and outside the technological fields, we can try to predict whether or not the Nike and RTKFT merger will be successful. Specifically, this article will research why an acquisition is deemed successful or not, and apply the found criteria to Nike and RTKFT's recent move. After such analysis, the following reasons were found to be a commonality among successful acquisitions: first, both companies exist in complementary industries where they can learn to grow from one another; second, both companies have a mutually beneficial economic relationship with the other; and third, both companies practiced similar work lifestyles and communication techniques. Based on those criteria uncovered via research on multiple key acquisitions done in the past, I predict that the Nike and RTKFT acquisition will be a successful one. Both company CEOs have expressed their excitement about learning from the other company through various social media platforms, and it seems that the companies have the potential to learn and grow together.[98]

[97] "Nike Joins the Metaverse Ecosystem with RTFKT Acquisition." CryptoSlate, December 14, 2021. https://cryptoslate.com/nike-joins-the-metaverse-ecosystem-with-rtfkt-acquisition/.

[98] Lawler, Richard. "Nike Just Bought a Virtual Shoe Company That Makes Nfts and Sneakers 'for the Metaverse'." The Verge. The Verge, December 14, 2021. https://www.theverge.com/22833369/nike-rtfkt-nft-sneaker-shoe-metaverse-company.

I. INTRODUCTION AND RELEVANT BACKGROUND

Based on the research conducted on different acquisitions that have occurred between different major companies in the past, I think that the Nike and RTFKT collaboration will be successful. One of the main takeaways when analyzing the different successful acquisitions is that these companies both benefited; one company did not outperform the other. Both companies worked hand and hand to promote the products and generate the highest revenue and popularity. Moreover, the office structure and how companies functioned were very similar, producing complementary working environments and cultures. Some examples of successful mergers include Disney, Pixar, and Marvel; Google and Android; and, even outside of the technological scheme, Exxon and Mobil. However, some not-so-successful mergers include AOL and Time Warner, eBay and Skype, and Quaker and Snapple.

A. NIKE AND RTFKT'S RESPECTIVE ROLES IN THE MARKET

RTFKT is presently one of the most innovative firms in the non-fungible token (NFT) and metaverse space. The company's Clone X project was unveiled recently, and NFT trading has already surpassed $100 million. Twenty thousand avatars were sold, with the lowest price topping $20,000 on the low end. Nike has also done exceptionally well in the last year, with Nike's current net income in 2020 being more than 2.54 billion USD. Moreover, purchasing RTFKT might enable Nike to increase its own manufacture of virtual wearables without any outside assistance. Neon-colored platforms designed by RTFKT in collaboration with The Fabricant are among the company's offerings.[99] At the same time, Nike hopes to contribute funds to the start-up so that it may continue to investigate the possibilities afforded by the metaverse, a burgeoning digital realm in which individuals can live a parallel existence to their real-world existence.

In October, the sporting goods company filed trademarks with the United States Patent and Trademark Office to sell branded sneakers in the virtual world. Nike announced in December that it had acquired RTFKT Studios (pronounced artifact), a digital collectibles firm that would allow the retailer to sell virtual sneakers that users can use to adorn their online avatars. Instead, the shoes will be worn by an avatar walking around a virtual area like Nikeland.

RTFKT co-founder Benoit Pagotto tweeted after the acquisition was revealed: "Since we started, we've always looked up to Nike with the ambition of creating the Nike born on the Metaverse." Although it's unclear what Nike's ambitions are for its new NFT division, there is speculation on one possibility: allowing customers to scan a QR code with their phone to have their new Nikes shown on their avatar in Fortnite or other applications.

B. NIKE'S HISTORY OF ACQUISITIONS

RTFKT is not the first company Nike has acquired. Nike has completed a total of seven acquisitions and nine investments. These deals combined have cost the corporation more than

[99] Lawler, Richard. "Nike Just Bought a Virtual Shoe Company That Makes Nfts and Sneakers 'for the Metaverse'." The Verge. The Verge, December 14, 2021. https://www.theverge.com/22833369/nike-rtfkt-nft-sneaker-shoe-metaverse-company.

$305 million and span across various industries, including Big Data Analytics, In-Store Retail Technologies, Enterprise Information Management, and others. Nike's first acquisition was Converse in 2003, followed by Celect in 2013, Invertex and Virgin Mega in 2014, Datalogue and Zodiac in 2016, and Playtally.com in 2017, all purchased for undisclosed amounts.[100] It is often debated why Nike chooses not to disclose the amounts they completed the acquisitions for, but the leading theory is that not disclosing these amounts may help the company attract other potential partners. Companies wanting to do business with Nike lack insight into how the company manages its acquisitions since such little is known to the public. Therefore, increased anonymity can be maintained, and Nike may have access to companies that would not otherwise reach out.[101]

Past aspects of the strategy included Nike's 2017 relaunch of the NikePlus membership app, which provides a customized selection for shoppers and gathers customer data to help Nike tailor products more effectively. The app allows Nike to learn which sports and styles shoppers prefer, how active they are, and gives them style tips. It also gives Nike a chance to connect with customers more directly. The Zodiac acquisition helped with this initiative by targeting customers with a more personalized experience.

C. NIKE AND NFTS

According to data from The Sole Supplier, after the announcement on December 13th, searches for NFT collectors and enthusiasts of Nike NFTs increased by 1,329 percent overnight. "This purchase accelerates Nike's digital transformation and allows us to serve athletes and creators at the nexus of sport, creativity, gaming, and culture," stated Nike, Inc. President and CEO John Donahoe. According to The Sole Supplier statistics, Nike joins its competitor Adidas in the metaverse ecosystem, which saw a slight bump of 200 percent in Adidas NFTs searches after the Nike purchase news. Last month, Nike and Roblox teamed together to create "Nikeland," a metaverse on Roblox's online game platform. According to Nike's official website, Nikeland features Nike buildings, fields, and arenas, and its design is based on the company's genuine headquarters. Nike is the latest large corporation to enter the blockchain area, following Pepsi. We should expect other sports apparel businesses to enter the virtual market as well, given that Nike and Adidas, giants in the industry sector, have recently done so.

II. NIKE'S EMERGENCE INTO THE METAVERSE

A. RELEVANT TERMINOLOGY

An acquisition is when one firm buys a portion or all of the stock of another company.[102] Acquisitions are often conducted to gain control of and expand on the strengths of the target firm. A merger is an arrangement in which two firms unite to become a single entity. An

[100] "Acquisitions by Nike." Tracxn. Accessed February 27, 2022. https://tracxn.com/d/acquisitions/acquisitionsbyNike.

[101] "Strategic Buyer of the Year: Nike." Mergers & Acquisitions, November 19, 2020. https://www.themiddlemarket.com/list/strategic-buyer-of-the-year-nike.

[102] "Mergers and Acquisitions Examples: Failures & Successes." ansarada. Accessed February 27, 2022. https://www.ansarada.com/mergers-acquisitions/examples.

amalgamation is the merging of two or more corporations into a bigger single entity in corporate finance. The acquiring business purchases the target company's shares or assets, giving it the authority to make decisions on the acquired assets without the requirement for Stockholders Equity approval. One of the firms becomes the other's parent company. An acquisition might help a firm swiftly expand its market share. Because the two firms engaged in the transaction had previously operated independently, they may have different goals. The original business may seek to grow into new markets, while the acquired business may desire to decrease expenses. A merger or acquisition can help a firm achieve significant development in a short period of time.

III. LEGAL ANALYSIS

A. SUCCESSFUL ACQUISITIONS OF THE PAST

When it comes to acquisitions, there are successful and unsuccessful cases that can be looked at to analyze if Nike's acquisition of NFTs will be successful for the brand or not. To start off with some successful cases, we can examine the Disney, Pixar, and Marvel acquisitions. Although Bob Iger has formally stepped down as CEO of The Walt Disney Company, his impact will linger on for decades, since he put Disney in a position to dominate the pop-cultural landscape for a long time. Disney completed the purchases of Lucasfilm, Pixar, Marvel Studios, and Fox during Iger's leadership and boosted its share in Hulu, and set the groundwork for Disney Plus. Iger had just been CEO for two months when it was announced that Disney would buy Pixar for $7.4 billion, about twice as much as Lucasfilm or Marvel had been paid. When asked about the Merger, Igor said:

> "Certainly, the acquisitions – I'd say of all of them – Pixar, because it was the first. And it put us on the path to achieving what I wanted to achieve, which is scale when it comes to storytelling. That was probably the best… What I wanted to do more than anything is, I wanted to send a signal to everybody at Disney that it was a new day, that we were more open-minded about expansion, in particular about partnerships."[103]

As seen from Igor's remarks regarding the acquisition, it was deemed successful because it bettered both companies; both were able to use their respective assets to increase popularity and revenue as a whole.

Similarly, in 2005, Google was just another ad-supported search engine. However, on July 11, 2005, the business completed what we consider to be its finest purchase to date-Android. Google spent the next three years building an operating system for mobile devices using the capabilities of its new Android team members. By a wide amount, Android is now the most popular mobile OS on the planet. According to the latest statistics from Statista, Android was utilized in 71.93 percent of all new devices in January 2021. Android also outperformed

[103] Scott Campbell Dec 30, and Scott Campbell. “Former Disney CEO Says Pixar Was His Best-Ever Acquisition.” We Got This Covered, December 30, 2021.
https://wegotthiscovered.com/movies/former-disney-ceo-says-pixar-was-his-best-ever-acquisition/
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more well-known competitors such as Microsoft's Windows Phone (and Windows Mobile), Nokia's Symbian, and, most famously, BlackBerry.

However, some of Google's other purchases have not fared as well. The $12.5 billion purchase of Motorola in 2011 is widely seen as one of Google's worst blunders, with the business being sold to Lenovo for just $2.9 billion just over three years later. Some of Google's previous acquisitions may still be classified as works-in-progress. Nest Labs, which Google purchased for $3.2 billion in 2014, has been sluggish to catch on, but with the decision to merge Google and Nest gadgets under one brand, major plans are certainly in the works. There is also the $2.1 billion purchase of Fitbit by the business. Google is unlikely ever to receive a higher return on investment than it did with Android.[104] This is why it was such a successful merger.

B. UNSUCCESSFUL ACQUISITIONS IN THE PAST

However, some mergers and acquisitions were not so successful, so it is crucial to analyze those as well so it can be seen if Nike will fall down a similar line and repeat that same misstep, such as when comparing eBay and Skype.[105] When eBay revealed in September 2005 that it was buying Internet telephony firm Skype Technologies for $2.6 billion, the future seemed bright. However, after four years of unmet expectations, eBay said on Tuesday that it was selling Skype to a group of private investors for $1.9 billion, bringing the union between the auction site behemoth and the fledgling VoIP service to an end. eBay had believed that by purchasing Skype, it would be able to boost communication amongst its consumers. Buyers could quickly communicate with merchants about things they were interested in, and sellers could use VoIP to create connections with consumers. However, the Skype-eBay partnership never materialized. The key reason is that email suffices for the majority of eBay users. A voice call between buyers and sellers is not required to complete a transaction. Moreover, the culture of the two companies was very different, which also made it difficult for both companies to work with each other together. eBay has a culture that is quite conservative and similar to that of a bank. Furthermore, throughout its four-year eBay period, Skype moved through various management teams, resulting in a lack of stability that did not assist matters at all. Thus, because of the different visions each company had as well as the different work atmosphere, the merger was not successful.

Another example of an unsuccessful merger was with Quaker and Snapple. Quaker Oats Co. decided to sell Snapple Beverage Corp. to Triarc Cos. for $300 million in 1997, just 27 months after paying $1.7 billion for the popular beverage producer. For a variety of reasons, the idea failed. Just as Quaker purchased the firm, the nation's demand for such beverages was quenched, and the market's expansion slowed. Coca-Cola Co. and PepsiCo Inc. rushed into the market with new goods, but Quaker failed to capitalize on the combination of Gatorade, often sold in grocery stores in bulk, and Snapple, often sold in convenience shops one bottle at a time. Quaker's losses from Snapple were more than the $1.4 billion gap between what it paid for the company and what it sold it for. While Snapple failed, Quaker invested millions of dollars on

[104] "Google Made Its Best Acquisition Nearly 16 Years Ago: Can You Guess What It Was?" Android Authority, May 26, 2021. https://www.androidauthority.com/google-android-acquisition-884194/.

[105] Patel, Kison. "The 8 Biggest Mergers and Acquisitions Failures of All Time." RSS. DealRoom, November 8, 2021. https://dealroom.net/blog/biggest-mergers-and-acquisitions-failures.

gimmicks to boost sales. Snapple also lost $160 million in operational losses in 1995 and 1996, implying that Quaker's total losses from Snapple are likely to exceed $2 billion. As seen from a financial standpoint, Quaker and Snapple would very much be seen as an unsuccessful merger due to Quaker's inability to adapt to a rapidly-evolving market environment.[106]

C. OPPORTUNITIES AND RISKS OF THE NIKE AND RTFKT COLLABORATION: LESSONS LEARNED FROM PAST DEALS APPLIED TO THE PRESENT ISSUE

When asked to comment on Nike's new acquisition, president and CEO John Donahoe said, "This acquisition is another step that accelerates Nike's digital transformation and allows us to serve athletes and creators at the intersection of sport, creativity, gaming, and culture." In response, RTFKT's founders Benoit Pagotto, Chris Le, and Steven Vasilev tweeted, "Since we started, we always looked up to Nike, with the goal to create the Nike born on the metaverse." Both companies seem to have a mutual gain by working together, which is an excellent sign of a successful acquisition. Moreover, the culture of both companies is very progressive and modern, with an emphasis on employee communication, comfort in the workspace, and openness to share any new ideas or creations that employees come up with. Moreover, both organizations place a premium on originality and invention in order to create items that cater to current consumer tastes.

Thus, when comparing why past acquisitions have worked amongst various companies and the similarities that Nike and RTFKT have with the similarities of the successful acquisitions, it seems to be the case that this acquisition will mutually benefit RTFKT and Nike and change the respective futures of the fashion and metaverse industry. However, one point to keep in mind as a potential reason as to why the acquisition may not be successful is the fact that RTFKT deviates from the types of companies that Nike typically works with in regards to its track record of success. When Nike recently acquired RTFKT, the public was stunned when they placed RTFKT's lightning bolt-style emblem beside its own renowned swoosh, Jumpman, and Converse emblems while announcing the acquisition – without saying how much it spent.[107] Those brands previously worked with have a long history of success, thanks to high-profile athlete sponsorships, unique designs, and a grassroots culture that persists in the real world. RTFKT, on the other hand, was created in January of 2020. Prior to when Nike had worked with Jumpman and Converse, the two separate companies were already extremely famous and were certainly not as new as RTFKT was on the market.

Also, the idea of sneakers was not a new development, a contrast to NFTs. Any generation, young or old, knows what sneakers are, while, according to a Yahoo News report regarding awareness and understanding of NFTs, issued on June 3rd, over 500 individuals were polled and it was discovered that prior to the poll, 66 percent of individuals had never heard of NFTs.[108] Approximately 14 percent had heard of them but had no idea what they were, and only

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[106] "Quaker-Snapple: $1.4 Billion Is down the Drain." Los Angeles Times. Los Angeles Times, March 28, 1997. https://www.latimes.com/archives/la-xpm-1997-03-28-fi-42931-story.html.

[107] Fayola Douglas, Campaign. "Nike Commits to the Metaverse with Virtual Footwear Acquisition." PR Week. PR Week Global, December 15, 2021.
https://www.prweek.com/article/1735986/nike-commits-metaverse-virtual-footwear-acquisition.

[108] Conti, Robyn. "What Is an NFT? Non-Fungible Tokens Explained." Forbes. Forbes Magazine, February 16, 2022. https://www.forbes.com/advisor/investing/nft-non-fungible-token/.

about 2% of respondents had previously acquired or sold an NFT. Half of those who were "acquainted" could define an NFT, and another 15% thought it was a cryptocurrency like bitcoin (BTC-USD). The 30-44 age group was the most likely to accurately characterize an NFT, while the 18-29 age group claimed the most acquaintance with them.[109] So, something to keep in mind is that even though it seems to be the case that Nike and RTFKT will merge successfully, their age and relative insignificance might potentially raise some issues.

In sum: analyzing successful and unsuccessful mergers can be relevant today when trying to decipher whether Nike's attempt to break into NFTs will be successful. For example, from witnessing past cases, it can be seen that one primary reason why acquisitions are not successful can be because of the culture of the companies and the workplace. If two companies have different work cultures, it can be challenging for the brands to mesh together. Another reason could be that the two companies simply do not have enough industry relevance in their partner's sector, such as Skype and eBay. If two companies are on opposite ends of the spectrum, it would be hard for collaborations to genuinely succeed. However, if the companies are similar enough in their organization and culture, and exist in complementary fields- such as Google and Android or Pixar and Disney- it would be relatively more manageable for the deal to be successful. So, given what we know about industry trends, Nike and RTFKT's respective and complementary management strategies and progressive culture, and, most importantly, their potential to mutually benefit one another, it seems reasonable to predict that Nike's acquisition of RTFKT will be a smart move.[110]

IV. CONCLUSION

This article has discussed essential criteria for determining and predicting successful acquisitions by reviewing past instances of successes and failures following moves of this kind and subsequently applied the findings to Nike's deal with RTFKT and recent emergence into the virtual world of NFTs. Mergers and acquisitions are used by businesses to achieve mutual benefits and further the growth of both parties, but they also allow new and creative intersections between industries. Although NFTs may be anything digital, the present buzz is all about using them to sell digital art. Since Bitcoin and the virtual selling market appear to be the way of the future, Nike appears to be taking a unique approach by gradually transferring its business into the digital buying/selling market.

However, Nike is not a typical NFT company, and there are indications to suggest that successful acquisitions require considerable similarities (beyond office culture) between the two market actors in order to work. This is exemplified by the high return on investment following deals between Disney, Pixar, and Marvel, and Google and Android, and the loss of profit following deals made by eBay and Skype, and Quaker and Snapple.

Nevertheless, after analyzing why past acquisitions were so successful between companies- both companies being in similar fields, having a mutually-beneficial relationship with each other, and similar work lifestyles and communication techniques, one can be confident

[109] "Only 20% of Americans Familiar with NFTS, 4 Million Have Used: Survey." Yahoo! News. Yahoo! https://news.yahoo.com/only-20-of-americans-familiar-with-nf-ts-4-million-have-used-survey-165016231

[110] Bertolucci, Jeff. "Skype, Ebay Divorce: What Went Wrong." PCWorld, September 1, 2009. https://www.pcworld.com/article/525316/skype_ebay_divorce_what_went_wrong.html.

that the Nike and RTKFT acquisition will indeed be successful. If this move does pan out favorably, the business sector is likely to be changed forever. Nike and RTKFT will set the precedent that even companies outside the tech industry can become successful, thus motivating other fashion/sport-related companies to enter the metaverse and into the future of industry.

IP Protections for Vaccines

Shannon Park

Abstract.

The absence of a fast, equitable, and affordable distribution of Covid-19 vaccines and technology for low and middle-income countries (LMICs) called into question the need for an IP protection waiver for Covid-19 vaccines. The debate arises from the conflicting interests between the public sector's motivation to improve health accessibility and the private sector's interest in innovation, which heavily depends on strong IP protection. While supporters of a waiver argue that patents and IP protection impede LMICs from accessing Covid-19 vaccines and technologies and aggravate inequalities between countries, an IP waiver for vaccines causes detrimental impacts on the healthcare industry and the health of eventual illegitimate covid-19 vaccine consumers. By examining the legal precedent of pandemic emergencies and evaluating alternative solutions for global leaders, this paper proposes that world leaders focus on improving access models like C-TAP or MPP to improve access to Covid-19 vaccines and technologies.

I. INTRODUCTION

The record-setting development of the Covid-19 vaccine astonished the world, and hopes were initially high that the pandemic would soon be over. However, due to economic, legal, and administrative barriers, many low and middle-income countries (LMIC) could not access the vaccines and technologies to produce the vaccines. As a result, Covid-19 cases rose as variants continued to emerge worldwide—over 435 million cumulative confirmed Covid-19 cases worldwide with over 5.95 million deaths, as of March 1st, 2022.[111] Just 63% of the world population received at least one of the Covid-19 vaccine doses.[112] Regardless, this number significantly drops to 8.3% for low-and middle-income countries (LMICs).[113] Due to the relative inaccessibility of vaccines for LMICs, in October 2020, India and South Africa leaders proposed an IP protection waiver for Covid-19 vaccines to the Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS).[114] In May 2021, US President Joe Biden announced his support for an IPR protection waiver of Covid-19 vaccines to help increase vaccine accessibility in LMICs.[115] However, a handful of World Trade Organization (WTO) members, including the United Kingdom, European Union, Australia, and Canada, opposed this proposal. They maintain that the waiver of IPRs is not the fundamental solution to the current inaccessibility and threatens current efforts towards innovation. The legal contention between LMICs and developed countries that developed Covid-19 vaccines sheds light on the legal principles of equality and fairness. While some believe the law should promote justice by protecting innovators and their works, others think the law should promote equality by creating avenues for the underprivileged parties like LMICs to be given legal advantages like IPR waivers to rise to gain equitable access to healthcare.

In light of this context, a central question arises in the face of the sudden vaccine implementation: How will the potential waive of IP protection for Covid-19 vaccines affect the healthcare industry and the health of eventual illegitimate Covid-19 vaccine consumers? This paper will first outline the general legal processes of vaccine patents and elaborate on the precedent of pandemic emergencies and the laws that arose from them. Finally, we will address this question by outlining the limitations of this waiver to improve the global accessibility of credible vaccines before evaluating alternative solutions for global leaders that focus on improving access models, as exemplified by C-TAP or MPP.

II. BACKGROUND INFORMATION ON TRIPS, IPR, AND COMPULSORY LICENSING

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[111] "WHO Coronavirus (COVID-19) Dashboard," March 1, 2022. https://covid19.who.int/.

[112] "WHO Coronavirus (COVID-19) Dashboard," March 1, 2022. https://covid19.who.int/.

[113] Hannah Ritchie et al., "Coronavirus Pandemic (COVID-19)," Our World in Data, March 5, 2020, https://ourworldindata.org/coronavirus.

[114] World Trade Organization. "Council for Trade-Related Aspects of Intellectual Property Rights." World Trade Organization , May 25, 2021.

[115] Targeted News Service. "Sen. Daines to President Biden: Waiving COVID-19 Vaccine Patents, IP Protections Undermines American Innovation". *Targeted News Service.* May 13, 2021 Thursday. https://advance.lexis.com/api/document?collection=news&id=urn:contentItem:62NG-H781-JC11-12F6-00000-00&context=1516831.

Intellectual Property Rights (IPRs) generally include patent, copyright, trademarks, plant breeders' rights, and trade secrets.[116] IP protection laws prevent other parties from developing, manufacturing, and distributing vaccines equivalent to already existing patented Covid-19 vaccines, including Moderna, Pfizer, and BioNTech.[117] To ensure that IP rights are protected at the international level, in January 1995, the WHO established the Trade-Related Aspects of Intellectual Property Rights (TRIPS) — a comprehensive multilateral agreement between all 164 member countries of the WTO on intellectual property at the international level.[118] Article 28 and 33 of the TRIPs Agreement grant patent holders the exclusive rights to make, use, and sell their patented product or process for a minimum of twenty years from the filing date.[119]

Article 15 of TRIPS explicitly outlines the requisites for trademark registrations to prevent anyone from registering for a trademark that overlaps with that of another producer: "Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colors as well as any combination of such signs, must be eligible for registration as trademarks." Article 15 also grants member countries the right to hold each other accountable for protecting IP rights through legal authority to require specific conditions and distinctiveness from existing products for eligibility for registration as a trademark.[120] Articles 15.1, 16.2, and 62.3 also grant legal IP protection for service marks and marks distinguished goods, including sound and smell marks.

The debate regarding vaccine IP rights waivers stems from the legal binding explicated in TRIPS that disables other countries from freely producing generic vaccines protected by patent laws. Under Article 28 of TRIPS, patent owners are granted exclusive rights to "making, using, offering for sale, selling, and importing," as well as ownership over products that are a direct outcome of their protected use of procedures. Patent owners also have "the right to assign, or transfer by succession, the patent and to conclude licensing contracts," which places developed countries with patented Covid-19 vaccines in the higher authorities over Covid-19 vaccine manufacturing and distribution. Upon infringement of these international patent laws, under Article 34, defendants will be obligated under judicial authorities' demands to prove that their process of obtaining an identical product is distinguished from the patented process.

III. COMPULSORY LICENSING AND VOLUNTARY MEASURES FOR FACILITATING VACCINE ACCESS

However, flexibility in TRIP Agreements exists via compulsory licensing. Governments allow designated non-patent holders to produce replicas of generic medicine at low costs

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[116] Durell, Karen. "Vaccines and IP Rights: A Multifaceted Relationship." *Vaccine Design*, 2016, 791–811. https://doi.org/10.1007/978-1-4939-3389-1_52.

[117] Gaviria, Mario, and Burcu Kilic. "A Network Analysis of COVID-19 Mrna Vaccine Patents." *Nature Biotechnology* 39, no. 5 (2021): 546–48. https://doi.org/10.1038/s41587-021-00912-9.

[118] "World Trade Organization." WTO. Accessed January 22, 2022. https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm.

[119] "World Trade Organization." WTO. Accessed January 22, 2022. https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm.

TRIPS Article 28 1. A patent shall confer on its owner the following exclusive rights; 2. Patent owners shall also have the right to assign, or transfer by succession, the patent and to conclude licensing contracts.

[120] *"Member countries are allowed to require, as an additional condition for eligibility for registration as a trademark, that distinctiveness has been acquired through use. Members are free to determine whether to allow the registration of signs that are not visually perceptible (e.g. sound or smell marks)."*

regardless of the patent holder's consent.[121] The requirements for mandatory licensing authorization are high. They are granted on a general rule only under exceptional circumstances, such as the failure of a voluntary license under the reasonable term. Economic values are taken into account.[122] The 2001 Doha Declaration on TRIPS addressed more significant health concerns by promoting access to existing and newly created medicines.[123] Specifically, it proposed solutions to problems with pharmaceutical production capacity that hindered compulsory licensing from working in less developed countries, such as a review of Article 27.23 on patentability, extended deadlines to apply for provisions on pharmaceutical patents, and communication avenues with the General Council of the WTO. As a result, Canada and other countries amended their Patent Act and Food and Drugs Act in 2004 to facilitate access to drugs in LMICs to address public health issues, namely HIV/AIDS, tuberculosis, malaria, and other epidemics.[124]

Legal changes have historically taken place in times of public health emergencies, including the employment of compulsory licensing to increase the accessibility of drugs.[125] During the 13th International AIDS Conference in South Africa in July 2000, global leaders focused on resolving the public health crisis in Africa and improving access to drugs. The HIV/AIDS epidemic in South Africa led to the development and usage of compulsory licensing for many lower-income countries to successfully produce and sell drugs at low prices. In 2004, Malaysia issued a compulsory license for HIV/AIDS drugs patented by GlaxoSmithKline and Bristol-Myers Squibb. In 2007, Thailand issued a compulsory license for an HIV/AIDS drug patented by Abbot.[126] Brazil also utilized the threat of mandatory licensing to negotiate and lower the price of Merck's HIV/AIDS patents. These examples illustrate that compulsory licensing overcame exclusivity challenges in which critical drugs were provided at unaffordable prices.

A. MEDICINES PATENT POOL (MPP)

Non-compulsory measures for increasing vaccine accessibility have proven successful in the past. One voluntary measure that can facilitate increased global access to Covid-19 vaccines while evading most costs of a compulsory IPR waiver is the Medicines Patent Pool (MPP). Established by UNITAID in 2002, a global health initiative, the MPP aims to provide multiple

[121] "World Trade Organization." WTO. Accessed January 22, 2022. https://www.wto.org/english/tratop_e/trips_e/public_health_faq_e.htm.

[122] TRIPS: *obligation, as a general rule, to grant such licences only if an unsuccessful attempt has been made to acquire a voluntary licence on reasonable terms and conditions within a reasonable period of time; the requirement to pay adequate remuneration in the circumstances of each case, taking into account the economic value of the licence; and a requirement that decisions be subject to judicial or other independent review by a distinct higher authority.*

[123] "WTO | The Doha Declaration Explained." World Trade Organization. World Trade Organization. Accessed March 2, 2022. https://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm.

[124] "An Act to Amend the Patent Act and the Food and Drugs Act (The Jean Chrétien Pledge to Africa)." Justice Laws Website. Government of Canada, May 14, 2004. https://www.wipo.int/export/sites/www/about-ip/en/studies/pdf/iipi_hiv.pdf.

[125] Gillespie-White, Lee, Venus Griffith, Albena Petrova, Stetson Sanders, and Paul Salmon. Rep. *Patent Protection and Access to HIV/AIDS Pharmaceuticals in Sub-Saharan Africa*. DC, Washington: International Intellectual Property Institute, 2000. https://www.wipo.int/export/sites/www/about-ip/en/studies/pdf/iipi_hiv.pdf.

[126] Rutschman , Ana Santos, and Julia Barnes-Weise. "The COVID-19 Vaccine Patent Waiver: The Wrong Tool for the Right Goal." Bill of Health. Petrie-Flom Center at Harvard Law School, May 5, 2021. https://blog.petrieflom.law.harvard.edu/2021/05/05/covid-vaccine-patent-waiver/.

generic drug manufacturers with licenses to patents and ultimately prevent, diagnose, and treat disease in LMICs.[127] In 2010, the UN first implemented the MPP, the first patent pool with a health mandate that works by negotiating licenses with patent holders and sub-licensing with generic companies that meet specific criteria and promises accessibility of the drugs with significant price reductions.[128]

Unlike the proposed IPR waiver, which strips drug companies of their primary profit source, the MPP benefits drug companies and developers by allowing them to utilize the improvements made by their licensees and still be paid for royalties. The MPP pushes a burden on licensees to generate high-quality, safe generic drugs and demonstrate efficient mass production and distribution methods.[129] Instead of having to single-handedly take the responsibility of improving their drugs – which drug companies already do not have incentives for – the developers can pass this burden to other generic companies who would happily pay for their licenses and help them improve the quality and quantity of their drugs. As a result of the licensees' efforts to improve the production and distribution of these drugs, a more significant number of the drugs would be supplied to under-developed markets without the need for the pharmaceutical companies to establish additional sales networks.[130] Not only does this positively affect humanity and help resolve public health crises, but it also increases profits for licensing companies, as more of their drugs are being produced and consumed around the world where demand is exceptionally high. While these demands were unable to be met due to logistical barriers, the MPP helps create new markets that open opportunities for a whole new pool of consumers.[131]

The MPP also has experience making drugs more affordable and accessible. The MPP currently has sub-licensing agreements with 25 generic manufacturers and signed agreements with 13 patent holders, gaining access to two experimental oral antiviral treatments and serological antibody diagnostic tests for Covid-19.[132] The creation of the MPP was essential to reducing annual HIV/AIDS treatment from $10,000, as it is in Europe, for less than $70 in Africa, according to Marisol Touraine, Chair of the Executive Board UNITAID.[133] Between Jan 2012 and Dec 2020, 18.55 Bn treatment doses have been supplied and saved 11,000 deaths due to MPP. By 2030, MPP will save 170,000 lives and save $3.5 Bn.[134] On October 27th, 2021, MPP signed an agreement with Merck & Co., which granted public companies access to a Covid-19 medical technology that can produce Molnupiravir, a form of potent ribonucleoside

[127] Crager, Sara Eve. "Improving Global Access to New Vaccines: Intellectual Property, Technology Transfer, and Regulatory Pathways." *American Journal of Public Health* 104, no. 11 (2014): 414–19. https://doi.org/10.2105/ajph.2014.302236.

[128] Crager, Sara Eve. "Improving Global Access to New Vaccines: Intellectual Property, Technology Transfer, and Regulatory Pathways." *American Journal of Public Health* 104, no. 11 (2014): 414–19. https://doi.org/10.2105/ajph.2014.302236.

[129] (Mesevic 2021 pg 26)

[130] Iza Razija Mešević, "Access to Covid-19 Vaccine: Patents vs. People?," *International and Comparative Law Review* 21, no. 1 (January 2021): pp. 43-78, https://doi.org/10.2478/iclr-2021-0002, 26.

[131] Iza Razija Mešević, "Access to Covid-19 Vaccine: Patents vs. People?," *International and Comparative Law Review* 21, no. 1 (January 2021): pp. 43-78, https://doi.org/10.2478/iclr-2021-0002, 26.

[132] "About Us." Medicines Patent Pool (MPP). Unitaid, January 7, 2022. https://medicinespatentpool.org/.

[133] "About Us." Medicines Patent Pool (MPP). Unitaid, January 7, 2022. https://medicinespatentpool.org/.

[134] "About Us." Medicines Patent Pool (MPP). Unitaid, January 7, 2022. https://medicinespatentpool.org/.

analog that inhibits the replication of SARS-CoV-2.[135] Subsequently, on November 16th, 2021, Pfizer and the MPP signed a licensing agreement of a Covid-19 oral antiviral treatment, ritonavir, an antiviral therapy that can potentially help Covid-19 patients evade severe illness that usually results in hospitalization and death.[136] Pfizer also claimed it would not receive royalties sales in LMICs and waive royalty sales to all countries if Covid-19 remains a Public Health Emergency of International Concern by the WHO.[137] In effect, the MPP alone enabled qualified generic medicine manufacturers to supply this treatment to 95 countries and cover about 53% of the global population, indicating its significant influence on advancing public health.[138]

B. COVID-19 TECHNOLOGY ACCESS POOL (C-TAP)

Another voluntary measure is the Covid-19 Technology Access Pool (C-TAP), which aims "to facilitate access to the resulting health technologies by pooling IP, data, regulatory dossiers, and manufacturing processes and other kinds of know-how" and to gather as much participation from countries to increase Covid-19 treatment worldwide.[139] Dr. Tedros Adhanom Ghebreyesus, WHO Director-General, acclaimed the licensing agreement between the Spanish National Research Council (CSIC) and MPP and C-TAP for a Covid-19 serological antibody technology: "This is the kind of open and transparent license we need to move the needle on access during and after the pandemic."[140]

IV. NEGATIVE IMPACTS OF IPR WAIVER FOR COVID-19 VACCINES

The waiver of vaccine IPRs or the issuance of compulsory licenses for Covid-19 vaccines does not solve accessibility issues for LMICs because it does not address problems with lack of information and manufacturing capacity. HIV/AIDS drugs were less challenging to replicate

[135] "The Medicines Patent Pool (MPP) and MSD Enter into License Agreement for Molnupiravir, an Investigational Oral Antiviral COVID-19 Medicine, to Increase Broad Access in Low- and Middle- Income Countries," MSD (Merck Sharp & Dohme Corp., October 27, 2021), https://www.msd.com/news/the-medicines-patent-pool-mpp-and-msd-enter-into-license-agreement-for-molnupiravir-an-investigational-oral-antiviral-covid-19-medicine-to-increase-broad-access-in-low-and-middle-income-countries/.

[136] "Pfizer and the Medicines Patent Pool (MPP) Sign Licensing Agreement for COVID-19 Oral Antiviral Treatment Candidate to Expand Access in Low- and Middle-Income Countries." Pfizer, November 16, 2021.https://www.pfizer.com/news/press-release/press-release-detail/pfizer-and-medicines-patent-pool-mpp-sign-licensing.

[137] "Pfizer and the Medicines Patent Pool (MPP) Sign Licensing Agreement for COVID-19 Oral Antiviral Treatment Candidate to Expand Access in Low- and Middle-Income Countries." Pfizer, November 16, 2021.https://www.pfizer.com/news/press-release/press-release-detail/pfizer-and-medicines-patent-pool-mpp-sign-licensing.

[138] "Pfizer and the Medicines Patent Pool (MPP) Sign Licensing Agreement for COVID-19 Oral Antiviral Treatment Candidate to Expand Access in Low- and Middle-Income Countries." Pfizer, November 16, 2021.https://www.pfizer.com/news/press-release/press-release-detail/pfizer-and-medicines-patent-pool-mpp-sign-licensing.

[139] "Operationalizing the Covid-19 Technology Access Pool (C-TAP)," n.d. https://cdn.who.int/media/docs/default-source/essential-medicines/intellectual-property/who-covid-19-tech-access-tool-c-tap.pdf?sfvrsn=1695cf9_36&download=true

[140] "Who and MPP Announce the First Transparent, Global, Non-Exclusive Licence for a COVID-19 Technology." World Health Organization. World Health Organization, November 23, 2021. https://www.who.int/news/item/23-11-2021-who-and-mpp-announce-the-first-transparent-global-non-exclusive-licence-for-a-covid-19-technology.

compared to Covid-19 vaccines, and third parties were no less knowledgeable about these drugs.[141] Williamson, (2021) claims "there is a world of difference between churning out generic Viagra and manufacturing a brand-new mRNA vaccine that has been around for only a few months," emphasizing the complexity of replicating newly innovated Covid-19 vaccines that is incomparable to the relatively simple replicating process of drugs for HIV/AIDS and other more well-known diseases.[142]

Supporters of such Covid-19 waivers propose that IPR waivers for Covid-19 vaccines would increase accessibility by decreasing vaccine prices and growing competition,[143] reduce external pressure from pharmaceutical companies and developing nations' governments,[144] and increase manufacturing capabilities by eliminating exclusive licensing agreements.[145] Additionally, some say that voluntary models aiming to increase accessibility to Covid-19 vaccines do not work: "no pharmaceutical company has committed to sharing its IP and technologies in the Covid-19 Technology Access Pool (C-TAP) since its launch more than five months ago."[146]

The controversy over this IPR debate brings us back to the humanitarian responsibility that developing nations hold in increasing the accessibility and affordability of Covid-19 vaccines to LMICs. Wealthy nations only represent 13 percent of the world population, but they pre-purchased half the doses of the world's five leading potential vaccines.[147] However, the disastrous global impact of the Covid-19 pandemic shows us that the pandemic "will not end for anyone, until it ends for everyone," as a UN human rights expert advocating for an equitable and globally-coordinated vaccine distribution program said.[148] The Omicron delta variant started in South Africa, where accessibility was lower. Now, the newer and more potent variant of Covid-19 threatens parts of the world that lifted their Covid-19 restrictions to revert back to lockdown and quarantine, highlighting once again that the Covid-19 vaccines are a public necessity. Therefore, a more significant effort from the US and other leading vaccine producers should be made to make Covid-19 vaccines affordable to LMICs. However, it is vital to make the

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[141] Rutschman , Ana Santos, and Julia Barnes-Weise. “The COVID-19 Vaccine Patent Waiver: The Wrong Tool for the Right Goal.” Bill of Health. Petrie-Flom Center at Harvard Law School, May 5, 2021. https://blog.petrieflom.law.harvard.edu/2021/05/05/covid-vaccine-patent-waiver/.

[142] Williamson , Kevin D. “Patent Medicine .” *National Review* , (June 1, 2021): 12–14.

[143] WTO Responses to Questions, *supra* note 20, 2.9.59.

[144] WTO, Council for Trade‑Related Aspects of Intellectual Property Rights: Examples of IP Issues and Barriers in COVID-19 Pandemic, Communication from South Africa, WTO Doc. IP/C/W/670 (Nov. 23 2020); WTO, Council for Trade-Related Aspects of Intellectual Property Rights: Response to Questions on Intellectual-Property Challenges Experienced by Members in Relation to COVID-19, WTO Doc. IP/C/W/671; Communication from The Plurinational State of Bolivia, Eswatini, India, Kenya, Mozambique, Mongolia, Pakistan, South Africa, The Bolivarian Republic of Venezuela and Zimbabwe, WTO Doc. IP/C/W/673, 37-40 (Jan. 15, 2021).

[145] WTO Responses to Questions, *supra* note 20, 2.9.59.

[146] Id. See also WTO, Council for Trade-Related Aspects of Intellectual Property Rights: Intellectual Property and Public Interest: Beyond Access to Medicines and Medical Technologies Towards a More Holistic Approach to TRIPS Flexibilities, Communication from South Africa, WTO Doc. IP/C/W/666, ¶ 8 July 17, 2020.

[147] *Small group of rich nations have bought up more than half the future supply of leading COVID-19 vaccine contenders*, OXFAM INT’L (Sept. 17, 2020), https://www.oxfam.org/en/press-releases/small-group-rich-nations-have-bought-more-half-future-supply-leading-covid-19.

[148] “Pandemic Will Not End for Anyone, 'until It Ends for Everyone' | Covid-19 | UN News.” United Nations News. United Nations, January 22, 2021. https://news.un.org/en/story/2021/01/1082762.

correct type of effort. A vaccine IPR waiver is not the solution due to its detrimental impact on the healthcare industry, economy, and consumers of fraudulent Covid-19 vaccines.
An IPR waiver for Covid-19 vaccines would increase the production of fraudulent vaccines, threatening public health and perpetuating negative misconceptions about vaccines. With the complete elimination of vaccine patents, malevolent producers can more conveniently retail unsafe counterfeit vaccines while advertising their products to be legitimate.

The expansion of social media and the Internet markets provides convenient avenues for the fraudulent sale of deceitful vaccine replicas. According to the Pharmaceutical Security Institute, the number of pharmaceutical counterfeiting incidents discovered between 2014 and 2020 doubled.[149] The waiver of IPRs will only exacerbate the current problem with fraudulent medicines. UN experts warned that this may cause the annual death rate from antimicrobial-resistant infections to "swell twentyfold, from approximately 700,000 today to more than 10 million by 2050."[150]

Furthermore, as more deaths and side effects are reported from the consumption of illegitimate vaccines, the public would likely generate a more negative perception of vaccines. Concerns over side effects and vaccines' legitimacy are already a significant hindrance to increasing vaccination rates. Although they claim that vaccines are effective at 5% globally, disagreement rates are as high as 33% in France and 28% in Libya.[151] In June 2020, the estimated acceptance of receiving a Covid-19 vaccine was 38% of the public surveyed in the UK and 34% of the people in the U.S.[152] Uncertainty on whether an individual would accept a Covid-19 vaccine was 31% and 25%, respectively. Loss of profit from counterfeit drug sales is estimated at $75 billion in revenue annually and has caused over 100,000 deaths globally.[153] Thus, with the decreased authenticity of vaccines, people will be less likely to trust Covid-19 vaccines. There may be increased cases of side effects from vaccines manufactured and distributed by non-credible companies and sellers.

A waiver would also destroy the healthcare industry by disincentivizing innovation as well as the economy that largely depends on it. Eliminating IPRs to their vaccine developments means stripping the innovators of the profit they make. This, in effect, disincentivizes innovators and companies to conduct Research and Development (R&D). The cost of taking a drug to market – a years-long process of lab testing and clinical trials that most often fail – ranges from $1 billion to $2.8 billion.[154] The entire R&D process for a single drug usually lasts a decade or

[149] "Covid-19 Vaccine and the Threat of Illicit Trade." OECD, December 21, 2020.

[150] "New Report Calls for Urgent Action to Avert Antimicrobial Resistance Crisis." World Health Organization. World Health Organization, April 29, 2019. https://www.who.int/news/item/29-04-2019-new-report-calls-for-urgent-action-to-avert-antimicrobial-resistance-crisis.

[151] Ritchie, Hannah, and Samantha Vanderslott. "How Many People Support Vaccination across the World." Wales, August 1, 2019. https://ourworldindata.org/support-for-vaccination.

[152] Loomba, S., De Figueiredo, A., Piatek, S. J., De Graaf, K., & Larson, H. J.. (2021). Measuring the impact of COVID-19 vaccine misinformation on vaccination intent in the UK and USA. *Nature Human Behaviour*, *5*(3), 337–348. https://doi.org/10.1038/s41562-021-01056-1

[153] Blackstone, Erwin A., Joseph P. Fuhr, and Steve Pociask. "The Health and Economic Effects of Counterfeit Drugs." *American Health & Drug Benefits* 7, no. 4, June 2014.

[154] Targeted News Service. "CSIS: 'Shot Heard Around World - Strategic Imperative of U.S. COVID-19 Vaccine Diplomacy'". *Targeted News Service.* November 23, 2021 Tuesday. https://advance.lexis.com/api/document?collection=news&id=urn:contentItem:6453-5CX1-JC11-10MV-00000-00&context=1516831.

more. Moreover, pharmaceutical industries typically spend 15% to 17% of their revenues on R&D.[155] Without IP protection, companies would hesitate to make enormous R&D investments, which is crucial in developing treatments for future diseases and health issues. In analogy to book publications, book publishers publish as many books as possible to put out a few bestsellers.[156] However, book publishers would not contribute so much time and effort if they lost their copyrights every time they had a bestseller. The resulting destruction of the healthcare industry will also threaten the economy that depends on it. The biopharmaceutical industry supports over 4 million jobs and generates over 1 trillion USD for the US economy. Since these pharmaceutical companies rely heavily on solid IP protection of their drugs and treatments, the waiving of IP protection will destroy this industry and significantly damage job creation, job retention, and financial growth.

Despite the current voluntary measures presented, MPP's current number of licensing agreements is insufficient to make Covid-19 vaccines affordable to all countries, and not enough vaccine providers have signed. The voluntary basis of this method leaves few mechanisms for the government to accelerate the number of MPP licensing agreements with drug innovators who hold access to vital technology and vaccines necessary to immunize the global population and ultimately end the pandemic. Furthermore, it is unlikely that MPP will be a perfect solution because of the limited production capacity to produce billions of vaccines and distribute them worldwide. India has the most significant potential to become the global supplier of Covid-19 vaccines in the southern hemisphere. Currently, the Serum Institute of India, the world's largest vaccine factory, produces ample supplies of AstraZeneca vaccines allocated for African states.[157] However, the current damages due to the Covid-19 outbreak and its resulting shortage of medical resources and damaged economy reduce India's chance of being the "pharmacy of the world" that can supply countries that lack the technology and capacity to produce Covid-19 treatment.[158]

Furthermore, building more capacity in LMICs is time-consuming and challenging. While relatively inexperienced in the pharmaceutical industry, South Africa aims to develop a filling plant for Covid-19 vaccines that can produce approximately $200 million in vaccines. According to Clemens Schwanhold, political officer at the non-governmental organization, "if [vaccine production sites] first had to be built and then approved, it would take months, maybe even years."[159] Regarding the urgency of saving lives and the global economy, there needs to be an alternative that can distribute vaccine rollouts globally faster.

Nevertheless, the technology transfer agreement, a vital aspect of the MPP, would significantly increase the production of manufacturing plants and inventions. As voluntary licensing agreements also involve the transfer of know-how between licensors and licensees, these agreements would enable countries with large production capacity to multiply necessary covid technology to a scale that suffices the global population that cannot afford Covid-19

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[155] Blackstone, Erwin A., Joseph P. Fuhr, and Steve Pociask. "The Health and Economic Effects of Counterfeit Drugs." *American Health & Drug Benefits* 7, no. 4, June 2014.

[156] Williamson , Kevin D. "Patent Medicine ." *National Review* , (June 1, 2021): 12–14.

[157] Ehl, David. "Covid: Which Countries Still Have No Vaccines?: DW: 11.04.2021." DW.COM, November 4, 2021. https://www.dw.com/en/covid-which-countries-still-have-no-vaccines/a-57128428.

[158] Andreas Stamm, Christoph Strupat, and Anna-Katharina Hornidge, "Global Access to COVID-19 Vaccines: Challenges in Production, Affordability, Distribution and Utilisation," German Development Institute, 2021, https://doi.org/10.23661/dp19.2021, 3.

[159]Ehl, David. "Covid: Which Countries Still Have No Vaccines?: DW: 11.04.2021." DW.COM, November 4, 2021. https://www.dw.com/en/covid-which-countries-still-have-no-vaccines/a-57128428

vaccines." These deals are very welcome developments and represent a balanced model for promoting the spread of innovative anti-COVID medical technology across the globe," said WIPO Director General Daren Tang. On the other hand, an IPR waiver does not resolve the issue of production capacity. Moreover, unlike voluntary IP licensing, an IPR waiver does not require technology transfers. Under the legislation of an IPR waiver, fraudulent manufacturers could legally manufacture a counterfeit Covid-19 treatment without proper training or receiving the "recipe" from the original developers.

On the other hand, the effectiveness of C-TAP is questionable due to the lack of participation from pharmaceutical companies, which stems from a lack of coordination with drug companies and relative newness and lack of credibility. The issue is that, although the main drivers of this program are pharmaceutical companies, the International Federation of Pharmaceutical Manufacturers and Associations (IFPMA) pointed out that they have not been included in the discussion of C-TAP before its official launch. As a result, pharmaceutical companies — the main stakeholders of this program — claim they can only fathom a limited understanding of what precisely the C-TAP is proposing and the mechanisms underlying this new program.[160] The operating model of C-TAP also lacks sufficient incentive that can outweigh the fears of pharmaceutical companies to provide licenses for their innovations. One of the pharmaceutical companies' greatest fears about committing to non-exclusive and transparent rights is that once their secret recipe is revealed, they may be exposed and taken advantage of even after the time-limited vaccine waiver ends.[161] Due to the irreversible nature of sharing secrets, pharmaceutical companies view even licensing agreements as a high-risk threat to their primary revenue source. The credibility of C-TAP could increase with greater elaboration and endorsement from world leaders. Still, the Director-General of the WHO has not mentioned anything regarding the C-TAP in his opening remarks at the 148th session of the WHO Executive Board.[162] Nonetheless, the C-TAP is relatively new compared to the MPP, which has ten more years of experience in facilitating access to essential medications, and the other existing institutions it was built around, including Tech Access Partnership (TAP), the Open Covid Pledge, and the Global Initiative on Sharing All Influenza Data (GISAID).[163]

V. CONCLUSION

As important as it is, achieving fast, equitable, and affordable access to Covid-19 vaccines and health technologies for the entire global population is a challenge that the world has struggled with for many years, long before Covid-19. Seeking a resolution to dissolve the conflict between the international public interest of overcoming the pandemic and private-sector interests in encouraging innovation requires a resolution that meets the interests of both parties

[160] "Trade Secrets Remain the Sticking Point in Global Debate over a Vaccine IP Waiver." Osborne Clarke, December 3, 2021. https://www.osborneclarke.com/insights/trade-secrets-remain-sticking-point-global-debate-over-vaccine-ip-waiver.

[161] "Trade Secrets Remain the Sticking Point in Global Debate over a Vaccine IP Waiver." Osborne Clarke, December 3, 2021. https://www.osborneclarke.com/insights/trade-secrets-remain-sticking-point-global-debate-over-vaccine-ip-waiver.

[162] World Health Organization. WHO Director-General's opening remarks at 148th session of the Executive Board, 18 January 2021.

[163] Iza Razija Mešević, "Access to Covid-19 Vaccine: Patents vs. People?," *International and Comparative Law Review* 21, no. 1 (January 2021): pp. 43-78, https://doi.org/10.2478/iclr-2021-0002.

— the public and private. An IPR waiver, however, does not help meet either goal because it will have devastating consequences for the private-sector interests in innovation and not meet the public sector's interest in increasing global access to vaccines. Focusing on improving the implications of voluntary programs like the Medical Patent Pool (MPP) may be the solution to finding a balance between achieving equitable access to vaccines universally and encouraging competition and incentives for the development of the health industry.[164] While the process may be costly and time-consuming, it is necessary for MDCs to work collectively with LMICs to ensure that every country has access to Covid-19 vaccines and technology to end the over two-year-long global pandemic.

[164] Iza Razija Mešević, "Access to Covid-19 Vaccine: Patents vs. People?," *International and Comparative Law Review* 21, no. 1 (January 2021): pp. 43-78, https://doi.org/10.2478/iclr-2021-0002.

The Business of Incarceration: Private Prisons and Legitimate Criminal Justice

Vidya Patel

Abstract.

This article aims to provide insight on whether or not the intersection of business and law through the creation of private prisons poses greater drawbacks than benefits. The intentions, outcomes, and consequences of private prisons will be analyzed with specific attention focused on the financial burden they aim to relieve, health outcomes they aim to address, and accountability and constitutionality with which they are facilitated. This analysis will determine that by outsourcing the responsibility of imprisonment to private businesses, the federal government exacerbates the core concerns of mass incarceration. For this reason, the drawbacks of private prisons are greater than the perceived benefits, and alternate solutions to addressing mass incarceration must be considered.

I. INTRODUCTION

In the early 1980s, due to President Reagan's "War on Drugs" policies, the prison system became overcrowded with inmates. In the past 40 years, the United States prison population has increased by 500 percent resulting in 2 million people in the nation's prisons and jails.[165] As a result of this increase, prison operating costs have exponentially increased since 1980, from $3.1 billion to more than $17 billion by 1994.[166]

Overcrowding in the prison system not only poses health concerns, but also legitimacy concerns across the criminal justice system; not having the necessary space, staff, or resources to look after inmates poses these concerns to the public about how the criminal justice system is working to manage the rehabilitation process. This is clearly shown in the lack of public confidence within the United States in the correctional system. Citizens do not trust that services provided by federal, state, and local governments will result in desired outcomes, including a reduction in crime and recidivism. The lack of public trust paired with the costs associated with overcrowding created a way for private prisons to emerge.

Public prisons are wholly owned by the government, meaning that the federal government provides all the facilities, staff, administration, and oversight within them.[167] The only outsourced systems within public prisons are food, mental health programs, cleaning, and maintenance services. On the other hand, private companies own private prisons to alleviate many of the federal government's responsibilities. The key distinctions between public and private prisons are their funding, rehabilitation efforts, and the types of inmates they host. The privatization process entails a contract process that shifts public responsibilities - in this case, those of the government - from the public sector to the private sector, more specifically the business sector. While public prisons are non-profit-generating entities, private prisons are run by corporations, which, in practice, aim to raise profits from the transactions they engage in. The contract between the private prisons and the government decides the payment for the corporation, which is dependent on the size of the prison.[168] In other words, the greater the size of the prison or the more individuals it can hold, the more profit corporations will be able to generate. This creates a contradictory incentive for private prisons to seek more convicted individuals to be placed in their facilities. This tension continues to grow after a few decades of private prisons having been in practice because there is the question as to whether or not the original intention of addressing the overcrowding in federal prisons is worth the consequences of private prisons for the United States criminal justice system in both practice and legitimacy.

The privatization of prisons to corporations poses a question of where responsibility lies in addressing public safety and the treatment of convicted individuals. Businesses and corporations have the intention of earning profit in their very nature, while the government, on the other hand, is non-profit and has the primary intention of upholding the law. If the justice

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[165] The Sentencing Project. n.d. "Criminal Justice Facts." The Sentencing Project. https://www.sentencingproject.org/criminal-justice-facts/.

[166] Austin , J., and G. Cogentry , 2001: Emerging issues on privatized prisons - office of justice ... *Emerging Issues on Privatized Prisons* . https://www.ojp.gov/pdffiles1/bja/181249.pdf.

[167] Federal Bureau of Prisons. 2021. "Federal Prisons." BOP. https://www.bop.gov/about/facilities/federal_prisons.jsp.

[168] Federal Bureau of Prisons. 2021. "Federal Prisons." BOP. https://www.bop.gov/about/facilities/federal_prisons.jsp.

system is observed to outsource its responsibilities of upholding the law and enforcing public safety and decreasing incarceration rates to private corporations, then the legitimacy of the system may be questioned. This publication aims to provide insight on whether or not this intersection of business and law poses a benefit or a drawback by analyzing the intentions, outcomes, and consequences of private prisons in the United States.

II. RELEVANT BACKGROUND

The intentions behind creating private prisons stem from the concerning nature of overcrowding prisons within the criminal justice system. Overcrowding in prisons results in increased violence, lack of sufficient medical care or services, and degrading practices, including prisoners sleeping on the floor and living in dangerous environments with extreme temperatures, contaminated food, and a lack of basic sanitation.[169] The 1995 case, *Carruthers v Tony*, addresses these types of conditions at the Broward County Jail. The case acknowledged that the conditions inmates were living under were unconstitutional, resulting in the placement of population caps.[170] Regardless of this ruling, overcrowding persists across the nation due to mass incarceration, and for this reason, private prisons were created. Another rationale behind the creation of private prisons is the financial constraints of the federal government to provide enough facilities, services, and resources to all the inmates. In other words, outsourcing to private prisons was a solution that allowed for the reduction of costs of overcrowding prisons in the federal government. Thus, the intention of private prisons was to address the ramifications of overcrowding on inmates' health and the financial implications of mass incarceration.

As of 2019, more than half of the states and the federal government rely on private prisons. Moreover, in 5 states, private prisons are housing at least 25% of the total state prison population.[171] As of 2021, 10% of American prisons are privatized, revealing that the criminal justice system now relies on this source of imprisonment. In 1997, over 20 companies in the United States operated private jails and prisons and accumulated, as a group, more than $250 million in annual revenues. Today, just two companies dominate the private prison industry: CoreCivic with 42% of the market and GEO Group with 37%.[172] As noted, overcrowding is the primary concern, and therefore there is little to no focus on the operations of these private prisons. In other words, there is a gray area regarding the exact regulations and obligations of private prisons to carry out the same practices as public prisons. Throughout the years, private prisons have relieved the burden of mass incarceration on the criminal justice system, resulting in little to no regulation or accountability when it comes to their operation.

Edward Latessa and Lori Lovins, researchers in the privatization of correctional facilities, outline the in-practice goals of private prisons and the rationale behind why they have increased in the past few decades. Their outline presents a threefold understanding of private prisons, beginning with saving taxpayers' dollars. Their argument states that companies and businesses

[169] ACLU. 2021. "Overcrowding and Other Threats to Health and Safety." American Civil Liberties Union. https://www.aclu.org/issues/prisoners-rights/cruel-inhuman-and-degrading-conditions/overcrowding-and-other-threats-health.

[170] *State v. Carruthers*, 35 S.W.3d 516 (Tenn. 2000)

[171] Eisen, Lauren B. 2019. "Privatized Corrections." *Criminology & Public Policy* 18, no. 2 (May): 419-446. https://doi.org/10.1111/1745-9133.12447.

[172] Swanson, Megan. 2002. "The Private Prison Debate." *Major Themes in Economics* 4 (7): 95-114. https://scholarworks.uni.edu/mtie/vol4/iss1/7

operate more efficiently and should apply this in their operation of prisons.[173] Companies and businesses claim that they eradicate miscellaneous bureaucratic steps that state agencies would not be able to do. In addition, profit companies argue that they are better able to recover state expenditure from the correctional populations in comparison to state-run prisons. Second, Latessa and Lovins describe private prisons' claim that they can save money while operating at the same level of quality, if not better. Third, businesses argue that because of their high level of innovation, they can provide brighter insights and expertise compared to state prisons regarding operation.[174] These three reasons will be investigated in this publication in an effort to understand if they are successful while upholding the integrity of the criminal justice system.

Finally, this publication will address the privatization of prisons in terms of constitutionality and authority to implement and uphold the law. It will also discuss how private prisons operate in comparison to public prisons and the importance of ensuring equity across both public and private prisons, despite the difference in ownership and leadership. As noted earlier, there is a difference in the offenders chosen to stay in public prisons compared to those in private facilities. Private prisons typically admit less violent offenders because serious offenders require a level of security that private prisons do not have.[175] This is critical when examining the differences between inefficient spending conducted by public and private prisons.

A. RELEASING FINANCIAL BURDENS

One key rationale behind private prisons is the enhanced efficiency they promise to provide. However, there are concerns with viewing private prison practices as more "efficient" or comparing them to public prisons in the first place. One, government spendings reports are required to be published in the public record; however, spending on the many nuances of the criminal justice system and its intersection with other systems can result in inaccurate reporting of costs. Two, finding two similar prisons to make comparisons is incredibly difficult. In the Law and Public Policy Division of Abt Associates in Cambridge, MA, senior social scientist, Douglas McDonald, states that the government has frequently failed to count the value of all physical assets used during a year of operation.[176] Nonetheless, studies have been conducted, including a report at the Gainesville Center for Studies in Criminology and Law, which compared ten private prisons with the public facility and found that all ten repealed cost savings ranging from 10.71% to 52.23%.[177]

As noted above, Latessa and Lovins have emphasized that private prisons do not decrease quality when decreasing costs. This may largely be due to the fact that roughly 80% of all prison operating costs are salaries for labor, and this is likely where firms and businesses are able to reduce their costs.[178] Important to note is that the wages for workers at the private firms are not

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[173] Latessa, Edward, and Lori Lovins. 2019. "Privatization of community corrections." *Criminology & Public Policy* 18, no. 2 (May): 323-341. https://doi.org/10.1111/1745-9133.12433.

[174] Ibid.

[175] Austin , J., and G. Cogentry, 2001: Emerging issues on privatized prisons - office of justice ... *Emerging Issues on Privatized Prisons* . https://www.ojp.gov/pdffiles1/bja/181249.pdf.

[176] Swanson, Megan. 2002. "The Private Prison Debate." *Major Themes in Economics* 4 (7): 95-114. https://scholarworks.uni.edu/mtie/vol4/iss1/7

[177] Ibid.

[178] Bowman, Gary, Simon Hakim, and Paul Seindenstat. 1993. *Privatizing correctional institutions*. New Brunswick, N.J.: Transaction Publishers,.

less, and if anything remains higher, than the government's wages for public prison staff wages. Other areas in which private businesses can lower their costs include the reduction of government inefficiencies, including the design of public prisons, which are often renovated government buildings, whereas private prisons are specifically designed to require fewer staff. Similarly, the technological innovation of private firms lowers construction costs, which has proven to have long-term savings.[179]

B. HEALTH CONCERNS

Private prisons are meant to alleviate overcrowding and health concerns associated with public prisons. To determine whether or not this has been accomplished, Seth Wesler, an investigative journalist, conducted a two-year series on the conditions within 13 privately run prisons. Wesler found little difference from the conditions of a public prison, stating that there were rows of bunk beds with very little room in between where the men would sleep with little privacy and one guard who would oversee everyone.[180] If anything, the private prison Wesler examined was equally crowded with respect to the Federal Bureau of Prisons regulations. In addition to population caps, the Federal Bureau of Prisons applies standards to how prisoners are to be fed, how guards should supervise them, and what is regarded as adequate medical care and attention. When the contracts between the federal government and companies are signed, the companies are obligated to follow some of these rules, but in certain areas, the private companies are permitted to create their own as they deem necessary. As a result of this, Wesler also found that the for-profit prisons use lower-trained medical workers with roughly one year of training resulting in prisoners talking to someone who is not able to provide adequate care if in the situation they fall ill. Furthermore, 10 of the 13 prisons broke state nursing practice laws.[181]

The landmark ruling of *Brown v. Plata* in 2011 determined that overcrowding in prisons was the primary cause of inmates' inadequate medical and mental health care. The United States Supreme Court held that prison overcrowding in the state of California violated the 8th amendment. Therefore, the California Department of Corrections and Rehabilitation (CDCR) has focused on redistributing inmates by decreasing the population to 137.5% of design capacity over a two-year period.[182] The concern, however, is that the main form of achieving this is sending more prisoners to out-of-state privately owned prisons. Therefore, the private prison industry is the winning party in this ruling as opposed to a fundamental change in the way in which sentencing and mass incarceration policies are upheld.

C. ACCOUNTABILITY AND THE CONSEQUENCES FOR THE LACK THEREOF

[179] Ibid.

[180] Davies, David, and Seth Wessler. 2016. "Investigation Into Private Prisons Reveals Crowding, Under-Staffing And Inmate Deaths." NPR. https://www.npr.org/2016/08/25/491340335/investigation-into-private-prisons-reveals-crowding-under-staffing-and-inmate-de.

[181] Davies, David, and Seth Wessler. 2016. "Investigation Into Private Prisons Reveals Crowding, Under-Staffing And Inmate Deaths." NPR. https://www.npr.org/2016/08/25/491340335/investigation-into-private-prisons-reveals-crowding-under-staffing-and-inmate-de.

[182] Newman, William J., and Charles L. Scott. 2012. "Brown v. Plata: prison overcrowding in California." *J Am Acad Psychiatry Law* 40 (4): 547-552. https://pubmed.ncbi.nlm.nih.gov/23233477/.

Private prisons have been held accountable as state actors in many federal court decisions when it comes to accountability; for example, in *Roles v Maddox*- the Prison Litigation Reform Act (PLRA) exhaustion requirements applied to private prisons. This is critical because this will allow for the law to have equal force for prisoners facing concerns with the practices within private prisons.

The Center for Constitutional Rights and Detention Watch Network brought forward a case stating that under the Freedom of Information Act (FOIA), the government is mandated to release details of its contracts with private prison corporations. The aforementioned private prison corporations (GEO and CoreCivic) decided to appeal this decision to the Second Circuit Court of Appeals, resulting in a final petition to the Supreme Court. On October 10, 2017, the Supreme Court denied this petition, which ended the lack of transparency and hidden practices of private prison contracts and contractors. This decision had implications for both private prison practices and abuses within the immigration detention centers[183].

D. CONSTITUTIONALITY

For years, the very constitutionality of private prisons has been questioned. Supreme Court Case, *Carter v. Carter Coal Company* in 1936, upheld the federal government's delegation of broad powers to private actors.[184] Private prisons at large are seen as a legal delegation of power by the government. One of the most crucial responsibilities of the federal government in terms of public trust and safety is the control of correctional facilities. Former director of the Vera Institute, Michael E Smith, explains how the responsibility and obligation of the federal government to uphold justice is different from their obligation to provide garbage collection services. Smith asserts that "justice is not a service, it is a condition and an idea."[185] To this end, the Supreme Court of Tennessee decided in the 1998 case *Mandela v Campbell* that the delegation of disciplinary authority to private corporations is not unlawful.

Understanding the constitutionality of private prisons requires an understanding of how private prisons can make a profit off of this practice. As soon as the prison company signs the contract with the government, the company builds the necessary facilities to operate the prison for the government. As mentioned earlier, this requires the company to hire correctional officers, psychologists, etc. It is clear that most private prison practices mimic state prison practices, which remains the case for prison labor as well. In-state jails, prisoners perform menial tasks for little to no pay. In private prisons, prisoners are actively taking part in the profit-making function in which the corporation is involved.[186] In a way, the private prisons are able to outsource and contract out their work to inmates and still earn corporate revenue.

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[183] Center for Constitutional Rights. 2019. "Supreme Court Rules in Favor of Government Transparency Against Private Prison Corporations." Press Center. https://ccrjustice.org/home/press-center/press-releases/supreme-court-rules-favor-government-transparency-against-private.

[184] *Carter v Carter Coal Company,* 298 U.S. 238 56 S. Ct. 855; 80 L. Ed. 1160 (1936)

[185] Eisen, Lauren B. 2019. "Privatized Corrections." *Criminology & Public Policy* 18, no. 2 (May): 419-446. https://doi.org/10.1111/1745-9133.12447.

[186] Hallett, Michael A. 2006. *Private Prisons in America: A Critical Race Perspective*. N.p.: University of Illinois Press

Prisoners have argued that these practices are a violation of the Punishment Clause of the Thirteenth Amendment because prisoners believe that they are being subjected to a form of involuntary servitude. However, Slaughter-House Cases have supported the notion that private prisons do not violate the thirteenth amendment. To expand, Louisiana passed a law that restricted the operation of slaughterhouses to a single corporation- a monopoly- and a group of butchers argued that the creation of this monopoly resulted in involuntary servitude that violated the thirteenth and fourteenth amendment.[187] The case ruled that the monopoly did not violate either amendment because the amendments were passed with the intention to grant equality to formerly enslaved people. Under this understanding, Louisiana law was constitutional, and the practice remained in place. Now applying this precedent to the case of private prisons results in a ruling whereby the act of prison labor within private prisons is constitutional and permissible. However, prisoners have argued that the current relationship between the government and private prison companies is not justified under the Punishment Act- arguing that the current practice closely resembles slave systems that the Thirteenth Amendment aims to abolish.

III. LEGAL ANALYSIS

Through analyzing the state of prisons and the ramifications of overcrowding, the intentions behind the establishment of private prisons were pure in theory. However, the consequences and active practice of private prisons, as outlined in the above sections, are seen to have adverse effects on incarcerated individuals across the United States. It can be understood and appreciated that the original intentions behind establishing private prisons entail releasing financial burdens for the federal government; however, the consequences alone must be assessed in an effort to determine whether or not this intersection of business and law poses a benefit or drawback to the criminal justice system at large.

Overcrowding is not a foreign practice in private prisons, and thus claiming that the creation of private prisons addressed overcrowding would be highly misleading. The ruling of *Brown v Plata* simply shifted the overcrowding concerns elsewhere to a certain degree, as noted by Wesler, who conducted the two-year series on the conditions within private prisons. In addition, the Justice Department launched a four-year investigation and found that per capita, privately-run prisons had more lockdowns, use of force by correctional officers, more assaults, and more complaints regarding their condition of confinement (including space, food, medical care, and staff).[188] In addition to Wesler's investigation, this study highlights the fact that the concerns of public prisons are not being addressed through private prisons, but rather transferred and carried out in a less regulated manner under privately owned corporations.

Along the same line is the discussion regarding incentivization for private prisons to house convicted individuals. To expand, there has been discussion and debate regarding the nature of incentivization when it comes to the way private prisons are run. Corporations manage prisons and are paid per prisoner per day, and as a result, they have a financial incentive to

[187] Marion, Ryan. 2009. "Prisoners for Sale: Making the Thirteenth Amendment Case Against State Private Prison Contracts." *William & Mary Bill of Rights Journal* 18, no. 1 (October): 213-247. https://scholarship.law.wm.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1009&context=wmborj.

[188] Feliciano, Ivette, Zachary Green, and Sam Weber. 2017. "Private prisons help with overcrowding, but at what cost?" PBS. https://www.pbs.org/newshour/show/private-prisons-help-overcrowding-cost.

extend inmate stay as long as possible.[189] In addition, for every prisoner that is released from a privately owned prison, there is a revenue loss for the operators, which confirms that there is an element of incentivization for the duration and quantity of inmates housed. The reason why private prisons are able to do this is because they have the ability to lobby directly to politicians to advocate for policies that could increase incarceration rates. The most blatant example of this is the "Kids for Cash" scandal, where a private prison company bribed two judges in Pennsylvania to enact a harsher sentence for the offender.[190] This event exemplifies how private prisons are incentivized to increase incarceration rates and sentences.

Additionally, one of the many responsibilities transferred to the private sector in the contracts between corporations and the government is punishment. The government is seen as a disinterested party held accountable by the general public and constituents, whereas the accountability for private businesses running private prisons is quite different. It can be argued that private prisons are accountable to taxpayers, residents, and inmates due to the fact that once a contract is arranged with the government, the firm must meet the government's expectations. However, in the grand scheme of things, depending on the nature of the contract, the private prisons do not have an obligation to voters, and their accountability can largely be ignored. Moreover, the administration of private prisons is not elected, appointed, or impeachable. The greatest level of accountability the private prisons have is to the government and public prisons, as their contracts outline. The question comes down to whether or not the contract is enough to claim that private prisons will be held accountable for any maltreatment of inmates. The case ruling of *Roles v. Maddox* does address the concern of accountability to a certain extent, but the simple practice of extending the responsibilities of the federal government to maintain a fair and consistent criminal justice system across the nation can be difficult when involving privately-owned organizations that have their own goals, practices, and intentions.

When it comes to the constitutionality of private prisons, specifically regarding the Punishment Clause of the Thirteenth Amendment, using the Slaughter-House Cases to determine constitutionality does not appear to be the most effective nor the most appropriate method. The movement against involuntary servitude was directed towards the treatment of African slaves in the United States and for that reason, to connect it to the practices of the slaughterhouse weakens and undermines the amendment and its implementation. As brought forward earlier, in private prisons, prisoners conduct and carry out work for the private corporations and create revenues for the corporation at large for no pay. If this argument was used, as opposed to the comparison to the monopolies of slaughterhouses in Louisiana, then perhaps a clearer parallel to the thirteenth amendment can be revealed.

Through evaluating and understanding the very creation of private prisons, it is understood that the legality of the government outsourcing their work is permissible. To add, the government outsources work, some of its responsibilities, and receives aid from private corporations often. However, where the line is drawn is how practices are carried out in this specific outsourcing of work. When it comes down to the practices of private prisons that result in adverse consequences for prisoners, it is clearer to understand the more realistic intentions behind private prisons. The United States not only has had a history of mass incarceration, but it

[189] Eisen, Lauren B. 2019. "Privatized Corrections." *Criminology & Public Policy* 18, no. 2 (May): 419-446. https://doi.org/10.1111/1745-9133.12447.

[190] Rath, Arun. 2014. "'Kids For Cash' Captures A Juvenile Justice Scandal From Two Sides." NPR. https://www.npr.org/2014/03/08/287286626/kids-for-cash-captures-a-juvenile-justice-scandal-from-two-sides.

presently also incarcerates more people than any other nation in the world.[191] The American criminal justice system holds almost 2.3 million people in a variety of different prisons, and private prisons were created in an attempt to create more space for the practices that mass incarceration has created, rather than addressing the root of the issue at hand.[192]

Private prisons are a way to distract and deter the necessary changes that need to be made to end mass incarceration. The Brennan Center for Justice has outlined solutions that could address mass incarceration. Starting off, there should be an elimination of lower-level crimes resulting in prison time.[193] Low-level crimes include drug possession or petty theft, and prison is too often used as a default for individuals committing low-level crimes. This is not to say that these individuals should not be facing any consequences, but rather their consequences should be centered around probation and treatment as opposed to prison. Prisons cost $31,000 a year per prisoner, and prevention or treatment for lower-level crimes would likely cost ten times less than that of prison time. Additionally, there should be a greater focus on retroactive, as opposed to reactive, approaches to dealing with crime. For example, any savings from the aforementioned change, should be reinvested into crime prevention policies, including schools and reentry programs to enhance and prioritize public safety.

IV. CONCLUSION

The goal of this publication was to provide insight on whether or not the intersection of businesses and laws in the creation of private prisons poses more significant benefits or drawbacks. By identifying the intentions, outcomes, and consequences of private prisons in the United States, the following conclusion can be drawn: the overcrowding of prisons was the trigger for the nation's creation and outsourcing of imprisonment to private companies. But, importantly, this trigger stems from a larger issue of mass incarceration. Overcrowding is a threat to the health and safety of individuals in prisons, but to claim that this is being addressed and mitigated through the creation of private prisons would be false. Private prisons also fall victim to overcrowding, clearly illustrating that they do not address the concerns; they exacerbate them. In addition to overcrowding, private companies were also expected to relieve the financial burdens of the federal government through a more efficiently organized and run prison system. This intersection of business and law was deemed to benefit the overall system at large because private prisons were found to run their prisons more efficiently while upholding the quality of their prisons. However, the ability of private prisons to do this is primarily attributed to their ability to pay their workers lower wages. In this case, the means to achieve the ends do not appear to be sound, and thus the theoretical efficiency that private prisons possess will end up posing larger drawbacks for workers within this industry.

In terms of accountability, private prisons raise significant concerns for constitutionality, as the somewhat monopolistic nature of the private prison industry raises concerns about the intentions of the private prisons to increase the number of inmates for financial gains. The found lack of accountability raises the most critical point of this analysis: private prisons, as

[191] Cullen, James, and Carlton Miller. 2018. “The History of Mass Incarceration.” Brennan Center for Justice. https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration.

[192] Ibid.

[193] Mai, Chis, and Ram Subramanian. 2017. “The Price of Prisons: Examining State Spending Trends 2010-2015.” Vera Institute of Justice. https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends.

corporations, are incentivized to undermine their government contracts in the pursuit of gaining higher profits. This is in contrast to public prisons run by the government, whose goal and purpose is to serve and protect the public. As a result, the root of the concern is revealed once again. If private prisons are able to profit more with the addition of inmates, they are contributing to the root cause that started this entire outsourcing process. Mass incarceration led to the creation of private prisons, and it has been determined that private prisons today not only aim to mask this concern of the United States Criminal Justice System, but also exacerbate it.

The War on Drugs policies that instigated the mass incarceration the nation is responsible for today cannot be masked or hidden through the use of private prisons. The implications of mass incarceration must be isolated and addressed on their own through the elimination of prison time for low-level crimes and the implementation of retroactive and more rehabilitative processes as opposed to reactive processes that are too little and too late for many individuals. As an intersection of business and the law, private prisons are not an appropriate way to address mass incarceration and should be eliminated to allow for the roots of mass incarceration to be addressed adequately.

The Legal Basis for Restricting Foreign Investment in the United States

Zain Raja

Abstract.

Renewed contention between the United States and China has led to the enhancement of the Committee on Foreign Investment in the United States, as the Foreign Investment Risk Review Modernization Act of 2018 was signed into law. The principles allowing for the creation of the CFIUS are due to the Defense Production Act. The council's origins occurred during the presidential administration of Gerald Ford in the form of an executive order. The council was used recently to approve a Lenovo acquisition and to block the sale of Qualcomm to Broadcom Limited to protect American 5G infrastructure.

I. INTRODUCTION

Intense political and economic competition between the United States and China has brought renewed attention to industrial production sources, the volume of imports, and foreign investment. Lawmakers' desire to protect American national security from deleterious investment from China, particularly in commercial communications infrastructure, has resulted in the passage of new legislation. The Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) expanded the Committee on Foreign Investment in the United States (CFIUS) powers. High barriers to foreign investment are an uncharacteristic development of the typically relaxed regulatory approach of the American government, underscoring the bipartisan popularity for taking a harsher stance against China.

Legal principles at play in this discussion are the scope of the interstate commerce clause in restricting investment and the limits of national security as a viable defense for government restrictions more broadly. The legal foundation for the restrictions on commerce lies in the U.S. Constitution. Section 8 of the Constitution provides Congress with the dual mandate of providing for the common defense and regulating commerce with foreign nations. These powers allow the federal government to restrict commerce and coerce the production of private goods and services in times of national emergency or war, as seen in the Defense Production Act of 1950. However, the Supreme Court has ruled in U.S. v Lopez that the interstate commerce clause cannot apply to an issue as broad as banning firearms in a school zone. In the Lopez case, the state's argument amounted to the fact that "Congress has accumulated institutional expertise regarding the regulation of firearms through previous enactments," which entitled the state to apply its power over interstate commerce to an adjacent issue.[194] Whether such broad measures relating to national security would hold up in a high-profile foreign investment case remains to be seen. It could be argued that the state has more justification and institutional knowledge on national security compared to firearms and social policy related to commerce, making the CFIUS a durable institution safe from legal invalidation. Legal concerns were also reinforced by political factors that made the passage of FIRRMA viable during an era of rapidly shifting and divided government.

Policymakers were presented with the difficult challenge of retaining the United States' status as the best option for financial investment while maintaining the public interest and recognizing the power foreign investors hold in corporate governance given majority shares or stake in a project, company, or venture. The preamble of the FIRRMA legislative text focuses specifically on limited cases in order to prevent abuse, block unwanted competition, and bring back a form of protectionism, stating that the law's purpose is "To modernize and strengthen the Committee on Foreign Investment in the United States to more effectively guard against the risk to the national security of the United States."[195] Valid criticisms of the legislation include the fact that the president himself must invalidate transactions under the advisory capacity of the CFIUS, when CFIUS could arguably be more effective as an interagency committee if the institution had

[194]Rehnquist, "*United States v. Lopez*, 514 U.S. 549 (1995).," Legal Information Institute (Legal Information Institute, April 26, 1995), https://www.law.cornell.edu/supct/html/93-1260.ZO.html.

[195]"H. R. 5841 - Congress," https://www.congress.gov/115/bills/hr5841/BILLS-115hr5841eh.pdf.

vested veto power. However, this also brings up legitimate concerns of abuse of power and conflict of interest-based on the format of the committee.

It must be noted that this tightening of foreign investment rules came during a time when there was widespread concern regarding the slow economic growth of the U.S. relative to China, a trend which is still of concern today. COVID-19-induced economic shocks to the global supply chain would have made a temporary reversal of FIRRMA rules to stabilize the domestic market politically viable. However, the absence of this development points to the legislation's foundation as the centerpiece of legal restrictions on dealings with hostile foreign entities, most notably China. CFIUS has profound implications for U.S. National security. While adaptation will be needed as markets continue to globalize and recover from COVID-19 induced economic shocks and supply chain shortages, FIRRMA will continue to be effective in preventing malicious foreign investment in critical American industries. This article will explain how newly added FIRRMA provisions and existing CFIUS powers create a robust framework for protecting American firms' intellectual property and autonomy while allowing for fair and compliant investment from international sources.

II. THE EVOLUTION OF THE CFIUS

The origins of CFIUS can be found in Executive Order 11878, authorized under the Republican administration of President Ford. However, it was only a monitoring body to analyze trends in foreign investment. President Reagan delegated the review power of foreign transactions to this body during his administration with the Exon-Florio Amendment, allowing the president to block mergers and acquisitions deemed harmful to national security. The amendment was initially deemed necessary because of Japanese foreign investment in the 1980s and is now being used to deter Chinese investment in sensitive industries. This trend demonstrates the flexibility of CFIUS over time, even though strengthening the body in FIRMAA was meant to address Chinese real estate investment specifically. CFIUS owes its origins and expanded powers to Republican and Democratic presidential administrations; however, formal Congressional approval of the institution would not come until the Foreign Investment and National Security Act of 2007 (FINSA). While FINSA expands Congress's oversight responsibilities, it allows the president to remain the lone figure who can suspend a transaction or investment with foreign actors involved. Famous transactions that have occurred after review by the CFIUS include the sale of Lenovo, the Uranium One takeover, and the proposed ban on TikTok under President Trump's administration.

FIRRMA mainly focuses on the real estate sector, with no technical provisions relating to a specific country, but rhetorical analysis from messaging around the law makes it abundantly clear that the legislation was meant to decrease Chinese real estate investment in the United States. FIRRMA added amendment 721 to the Defense Production Act of 1950, allowing real estate transactions to be voided. This filled the void of concern regarding real estate transactions that would allow Chinese investors access to proprietary information of U.S. technology firms. Access to unique industry secrets was already a concern with firms entering the Chinese market, as Chinese business partners would often engage in deals and record partnering businesses' practices with little to no legal repercussions in the Chinese legal system. With the passage of FIRMAA, reporting within a 30-day window of a transaction became crucial if it fell under agency watchdog guidelines. The window jumps to 45 days if an issue emerges, ensuring that the

regulatory process does not become drawn out and transactions can be cleared with certainty within a reasonable timeframe. The criteria for CFIUS review are "transactions that involve a country of 'special concern' that has a strategic goal of acquiring critical technology or critical infrastructure that would affect U.S. leadership in areas of national security." The Department of the Treasury has been adamant on the sole focus of the committee's focus on national security versus advancing American foreign policy goals in general or advocating for American economic interests by any means necessary, wary of previous eras of protectionism in the United States.

The Exon-Florio amendment attached to CFIUS grants the executive the power to suspend a transaction without judicial review. Since Marbury v. Madison, judicial review has allowed the judicial branch of government the power to review legislation and government policy and rule if it is unconstitutional or not. However, the Exon-Florio amendment and its legislative codification make CFIUS a unique governmental mechanism, as a court cannot overrule judgments made using the body. The choices that CFIUS presents to the president regarding a foreign investment that is deemed harmful are not as binary as approving the transaction or banning it. Some nuance is allowed on a case by case basis as "CFIUS also has the authority to negotiate "mitigation agreements" to resolve identified national security threats presented by a transaction."[196] For example, even though Chinese investors and companies can absorb proprietary technology from American firms during joint ventures or partnerships without much recourse in the legal system, the mitigation agreement provision ensures that investment can still occur in edge cases with assurances for American companies. This might mean allowing business transactions that do not deal with American consumer data or patented technologies that help American firms retain an edge in a global market.[197]

FIRRMA is also relevant in that it expanded the critical application of the control rule. Prior to FIRRMA, CFIUS would look for clear intent to control an American business by a foreign investor to endorse suspending or disallowing the transaction. With FIRRMA now in place, new factors, including access to sensitive company materials and even minor governing powers, are considered when weighing foreign investment.

In recent years, the jurisdiction of national security policy has faced intense scrutiny. In general, though the legislative branch has enumerated powers related to foreign policy, such as the power to declare war and approve treaties, it still cedes most authority to the Executive branch on policy. This development is due to the United States' emergence as a superpower, meaning that American decision-making on the world stage is needed frequently in a rapid manner. Congress would not respond in the timely manner necessary to review foreign investment on a case-by-case basis, necessitating the creation of tools such as CFIUS and legislation like FIRRMA. Though the guise of national security has been used during wartime to allow restrictive measures on First Amendment rights protecting speech and expression, there is a more narrow band of measures that can be taken during peacetime and when dealing with abstract concepts such as economic harm and corporate control. Previous "Transactions that have

[196]"CFIUS Reform under FIRRMA," Federation of American Scientists https://sgp.fas.org/crs/natsec/IF10952.pdf.

[197] "Financial Restructuring & Insolvency ," Shearman & Sterling https://www.shearman.com/-/media/Files/Perspectives/2020/09/Financial-Restructuring--Insolvency-Finance-A-New-Restructuring-Plan-FIN-091620.pdf?la=en&hash=8FB4EEAD81E4E2A8C83ECF3583BC060370BBCC3B.

triggered CFIUS's scrutiny have ranged from the obvious (the acquisition of a U.S. business with federal defense contracts) to the seemingly benign (investments in offshore wind farm projects.)"[198] Other national security violations include being too close to national defense facilities, access to classified information, and links with government contracts.

III. KEY CASES INVOLVING CFIUS

The most significant case in recent years under CFIUS purview was the suspended sale of Qualcomm to Singaporean Company Broadcom Limited. Qualcomm is the standard-bearer for 4G and 5G telecommunications networks in the United States. Allowing foreign companies access to such a crucial part of the American communications infrastructure holds clear and present conflicts of interest from the perspective of national security. In this case, the legal issue at hand was the application of CFIUS' authority to halt a hostile takeover in the critical telecommunications sector. The deal was worth an estimated $130 billion, which was the largest agreed to deal in the history of the technology sector at the time.[199] The findings by the committee cannot be overturned in court, only the committee's jurisdiction in specific transactions and sectors. The federal register statement released by President Trump stated that "There is credible evidence that leads me to believe that Broadcom Limited, a limited company organized under the laws of Singapore (Broadcom)...through exercising control of Qualcomm Incorporated (Qualcomm), a Delaware corporation, might take action that threatens to impair the national security of the United States."[200] President Trump was utilizing the guidelines of CFIUS that allowed for the blocking of financial investment if it threatened critical digital infrastructure in the United States. 5G falls under this category because it provides cellular data to computers, mobile phones, and emergency services. This is where a critique of the president's unilateral powers over voiding transactions might be raised; however, the counter-argument from the policy's supporters would be the limited number of transactions that fall under the scope of the CFIUS and the even fewer number of them that are negated or affected by the committee. With legislation such as the Alien and Sedition Acts along with the Espionage Act of 1917 and Sedition Act of 1918, which suppressed speech against the government's war effort in World War I, it should be no surprise that there is legal precedent for sweeping powers given to the government during wartime. However, there is a good debate regarding the flexibility and scope of national security jurisdiction in times of peace without a "hot war" that would tacitly activate the government's emergency powers to preserve the republic. Restricting the federal government's right to regulate interstate commerce could negatively affect national trade policy, national security, and federalism.

A conflicting case where the deal was approved would be Lenovo's acquisition of IBM's P.C. Division in the early 2000s. The Chinese government partially owns Lenovo. This case was a more routine use of CFIUS. Most transactions submitted to the CFIUS win swift approval, and very few are ever put under scrutiny using the full force of a CFIUS investigation. The main

[198] "CFIUS Overview // Cooley // Global Law Firm," // Cooley // Global Law Firm, n.d., https://www.cooley.com/services/practice/export-controls-economic-sanctions/cfius-overview.

[199] "Timeline: Broadcom-Qualcomm Saga Comes to an Abrupt End," Reuters (Thomson Reuters, March 14, 2018), https://www.reuters.com/article/us-qualcomm-m-a-broadcom-timeline

[200] "Trump Blocks Broadcom-Qualcomm Deal, Citing National Security Concerns," CNBC (CNBC, March 13, 2018), https://www.cnbc.com/2018/03/12/trump-issues-order-prohibiting-broadcoms-bid-to-take-over-qualcomm.html.

issue, in this case, was that "Lenovo's Chinese employees might have access to "sensitive" work being done at the Raleigh facility" including access to server tools used to assist customers including the U.S. government.[201] Such concerns were addressed by a separate building for Lenovo operations in Raleigh. Once again, a modicum of flexibility allowed the deal to be workable, pointing to the fact that only the most egregious deals that have no way to protect national security get rejected. It also shows the capacity of regulators to look past a potential vector for industrial espionage if the risk is deemed insignificant or ruled out. In this case, the ruling dovetailed excellently with economic efficiency considerations for an aging and near defunct IBM PC division. Despite differences, negotiations between IBM and the Committee prevailed, showing how a middle ground can arise between the lines of legislation even once the investigation mechanism was activated.

The Qualcomm sale and Lenovo acquisition dealt with sensitive digital infrastructure within the United States. Differences between the two cases can be seen in their ability to ameliorate potential breaches in information. It would be nearly impossible for the U.S. government or state or local governments to monitor Broadcom's installation of 5G network infrastructure across the United States for the Qualcomm case. Access to the entire nation's cellular network certainly could operate as a liability with heightened tensions between the United States and China. In the extreme case of military escalation, it is not unlikely that CCP officials could take control of Broadcom by force to disrupt digital communication within the United States. These two cases are helpful in exploring the bounds of CFIUS rather than the Uranium One Sale or the controversy regarding Dubai Ports World. The two cases above have relatively clear-cut resolutions and paths to take for the regulatory process: blocking the deals to maintain national security. The Lenovo case was simpler to maneuver around because of the physical infrastructure of the building retaining servers being separate from new business operations. Such delineation from existing operations could be more complex and costly for installing 5G towers or network services in areas all across the country. Another critical element of CFIUS policy is the committee: "The committee does not say publicly whether it is studying a certain transaction, nor does it reveal any decision it makes."[202] It is unclear whether this is to partially conceal its role in partially restricting open market access or preventing increased lobbying roles. CFIUS could likely withstand a public pressure campaign because of undercurrents of protectionism within the American electorate and a lack of desire to see foreign companies owning American capital due to fears of lost jobs. This points to both the lack of public record of an investigation and the resulting conclusion being a result of attempting to prevent the formation of a sub government that could compromise national security. Lobbyists for firms associated with or that contract with foreign countries could have diverging incentives to protect their clients or the national interest of the United States.

IV. CONCLUSION: THE SALIENCE OF RESTRICTING FOREIGN INVESTMENT

Clamping down on potentially harmful foreign politicians' desire to restrict investment does not make too much sense, as the traditionally held wisdom is that politicians welcome

[201] "Security Concerns over IBM Deal," Los Angeles Times (Los Angeles Times, January 24, 2005), https://www.latimes.com/archives/la-xpm-2005-jan-24-fi-lenovo24-story.html.

[202] "July 2019: Legal Challenges to CFIUS Reviews," JD Supra, https://www.jdsupra.com/legalnews/july-2019-legal-challenges-to-cfius-54793/.

money entering the economy. However, politicians are also wary of their electoral prospects, and being blamed for a breach of national security does not bode well for re-election odds. Views of China among American citizens have consistently trended downwards in recent years despite steps to create stronger bonds between the two countries as recently as two decades ago with the permanent normalization of trade relations with China under the Clinton administration. This makes CFIUS the ideal mechanism to deal with possible hostile foreign investment. It does not devolve into blatant protectionism but instead allows for tweaking specific investment deals to fit transactions and make them acceptable to the committee. If the Committee were too stringent, industries would undoubtedly be intense pushback by lobbying to strip the committee of powers or abolish it altogether.

When Prices Go Off the Rails: Assessing the extent to which railroads can solve pandemic-related supply shortages

Sajan Srivastava

Abstract.

Modern supply chains rely on complex operations, the logistics of which were thrown out of sorts by the COVID-19 pandemic. The transportation of produced goods remains the most convoluted aspect of these supply chains, requiring vast infrastructural investments and a reliance on the freedom of corporations to meet consumer demand. This article discusses the extent to which rail-based freight transportation corporations have progressively lost this freedom due to continuous regulation throughout the history of American industry and analyzes the implications of these legislative impediments in alleviating the strain on supply chains during the pandemic. This article commences by providing context for pandemic-induced shortages and delays. Part I gives an overview of the freight rail industry and addresses the vitality of railroads in supply chains. Part II describes the historical developments of restrictive federal legislation since the introduction of railroads as a means of industrial transportation by analyzing case law and the Congressional charters of the nation's founding rail company. The final section, Part III, examines current issues in the freight rail industry, citing tensions between the industry's governing body and private railroad corporations and explaining how regulatory precedent gives the government the upper hand in these conflicts.

I. INTRODUCTION

As manufacturing flourished during the Industrial Revolution, railroads served as a significant economic boon for the United States. Following the advent of the steam engine, private corporations perceived rail transit's unmatched efficiency, versatility, and reliability to be a sufficient justification for establishing railroads as the nation's primary source of industrial connectivity. These corporations sought to capitalize quickly on the novel technology, ensuring that rail would ascend to the height of freight transportation. Seeing that the railroad industry showed promise for future westward expansion, the United States government laid the groundwork for these triumphs of private enterprise. As a result of this initial federal involvement, the government maintained its stake in subsequent railway construction projects. Despite the massive economic benefits that the industry sparked in the nation, increasingly progressive governments in the late 19th century questioned the implications of a powerful private influence over the economy. As private corporations began to profit from the stronghold they had on American supply chains, the government quickly responded by enacting a stream of stringent rate regulations and establishing a new governing body to restrain interstate rail activity. Since the invention of the automobile, there has been a sharp decline in the use of railroads as a means of industrial freight transportation. However, this decline far predates automobiles' rise to prominence; instead, the impetus of the decline occurred far earlier, with the introduction of harmful antitrust legislation in the late 19th century. Truck-based freight transportation only exacerbated the downfall of railroads in this regard.

Since the beginning of the COVID-19 pandemic, American markets have failed to perform. Corporations have reduced average production volume in order to produce medical equipment. The volatility of the labor market has made it difficult for employers to hire at good wages, and desperate monetary policy has stymied the natural procession of consumer spending, placing impossible demands on suppliers. Together, these changes have spiraled into extreme disruption for American supply chains. Nine hundred forty of the largest 1,000 American corporations have experienced pandemic-induced supply chain disruptions.[203] The underlying issue behind this turmoil lies in the pandemic's perpetual uncertainty. Undeniably, consumer demand has been altered for the foreseeable future, but how can we adapt our supply chains to account for this change before shortages devastate American industries? To a certain degree, the fundamental shifts in demand during the pandemic will inevitably result in shifts in production.

However, in the long run, the optimal solution to the problems lies not in further regulating private production but rather in fixing the blockages in the transportation of produced goods. Currently, American industrial transportation is dominated by trucks, which account for 39.6% of the total freight miles of all goods transported in the U.S. By contrast, only 27.9% of freight transportation occurs by rail.[204] Rail-based and truck-based freight transportation work closely together, as many railroad corporations control the operations of chassis, the steel beds with which goods are loaded onto trucks—as such, maintaining a healthy balance between the two methods of transportation remains integral to the flow of supply chains.[205] To allow railroads

[203] "Changing Paradigms." How global disruptions are re-inventing supply chains. Accenture, n.d. https://www.accenture.com/_acnmedia/PDF-138/Accenture-Changing-Paradigms-COVID.pdf.

[204] "Freight Rail Overview." Freight Rail Overview | FRA, https://railroads.dot.gov/rail-network-development/freight-rail-overview.

[205] "Freight Railroads: A 24/7 Link in the Supply Chain." Association of American Railroads. AAR, February 10, 2022. https://www.aar.org/supply-chain.

to complement truck-based transportation more closely would have been a straightforward approach to conquering the supply chain amidst anomalous demand during the pandemic; however, the regulatory precedent brought on by early antitrust legislation never gave the industry a fighting chance.

II. THE NEED FOR RAIL

During the COVID-19 pandemic, American ports have experienced massive shipping delays and congestion, for which both American producers and consumers have borne the cost. As consumer spending became largely unpredictable and the labor market scarce, the United States faced a dramatic surge in imports at various pandemic stages, which induced a shortage of available shipping containers for transporting imported goods.[206] In October 2021, cargo ships holding as much as 20 million metric tons of goods could not dock at the nation's busiest Port of Los Angeles.[207] The Biden Administration has responded to these bottlenecks by passing legislation that requires several ports – including the Port of Los Angeles – to operate on a 24-hour basis. Several corporations, including Target, Walmart, Samsung, Home Depot, FedEx, and the United Parcel Service, have welcomed this legislation, seeing it as a means to increase daily volume flow and productivity.[208] However, the increased operating hours come at a price for corporations that primarily utilize truck-based transit and hire workers accordingly, as they struggle to hire employees to manage the internal supply chain around the clock. Moreover, while this legislation calls for increased port *volume*, it fails to address the *inefficiencies* of modern port logistics, many of which descend from the limitations and impairments of truck-based freight hauling.[209] In contrast with truck-based transportation, railroad corporations meet several criteria associated with alleviating these inefficiencies: they already operate on a 24-hour basis, pay employees 64% higher than the average U.S. employee, and consume less fuel per ton per mile of transit.[210]

Railroads have played a significant role in sustaining supply chains throughout the pandemic. However, the freight rail industry suffered an 18% decline between February and April 2020; this volume recovered to its pre-pandemic levels by Q3.[211] In particular, railroads have contributed to the transportation of grains and lumber from rural farms to significant cities, maintaining the domestic food supply and manufacturing capabilities in the U.S. despite panic from consumers and a drastic increase in demand. They had also remained an integral

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[206] *Id.*

[207] Kay, Grace. "Nearly Half a Million Shipping Containers Are Stuck off the Coast of Southern California as the Ports Operate below Capacity." Business Insider. Business Insider, October 6, 2021. *https://www.businessinsider.com/shipping-containers-stuck-california-ports-combat-shortages-2021-9.*

[208] Naidu, Richa. "Factbox: How Target, Home Depot, UPS, Fedex Plan to Ease U.S. Port Congestion." Reuters. Thomson Reuters, October 13, 2021. https://www.reuters.com/business/how-target-home-depot-ups-fedex-plan-ease-us-port-congestion-2021-10-13/.

[209] Kay, Grace. "Nearly Half a Million Shipping Containers Are Stuck off the Coast of Southern California as the Ports Operate below Capacity." Business Insider. Business Insider, October 6, 2021. https://www.businessinsider.com/shipping-containers-stuck-california-ports-combat-shortages-2021-9.

[210] "Freight Railroads: A 24/7 Link in the Supply Chain." Association of American Railroads. AAR, February 10, 2022. https://www.aar.org/supply-chain.

[211] Schofer, Joseph L, Hani S Mahmassani, Max T.M. Ng, and Breton L Johnson. "The U.S. Railroads and Covid-19: Keeping Supply Chains Moving." Northwestern University Transportation Center, May 2021. https://www.transportation.northwestern.edu/docs/2021/20210614_aar-report-final-d-june-2021.pdf.

component of the shipment of personal protective equipment and medical plastics when the country desperately needed rapid, efficient transportation of such materials.[212] Additionally, railroads have borne the burden of increased consumer reliance on e-commerce.[213] Even during the height of the pandemic in early 2021, over 300,000 shipping containers completed their journey through the domestic supply chain by rail each week.[214] However, given the vast quantity of existing freight rail infrastructure and rail-based transportation's superior efficiency, the supply chains have been underutilizing this proven method of domestic shipment.

A. OVERVIEW OF THE FREIGHT RAIL INDUSTRY

Rail companies are divided into three classes –- Class I, Class II, and Class III — which are assigned based on their annual operating revenues (A.O.R.). Class I railroad corporations control most transcontinental freight transportation. Class II railroads, also known as "regional" railroads, often function as interstate transporters, generally over shorter distances than Class I. Class III railroads, often referred to as "short line" railroads, tend to haul goods between ports and nearby hubs.[215] For this article, the analysis will focus on Class I railroads, which must have an A.O.R. of at least $490,000,000[216]*. Today, seven railroad corporations meet this threshold: BNSF Railway, Canadian National Railway, Canadian Pacific Railway**, C.S.X. Transportation, Kansas City Southern Railway, Norfolk Southern Railway, and Union Pacific Railroad. These companies fall under the jurisdiction of Surface Transportation Board (S.T.B.), which currently

[212] "Freight Railroads: A 24/7 Link in the Supply Chain." Association of American Railroads. AAR, February 10, 2022. https://www.aar.org/supply-chain.

[213] Schofer, Joseph L, Hani S Mahmassani, Max T.M. Ng, and Breton L Johnson. "The U.S. Railroads and Covid-19: Keeping Supply Chains Moving." Northwestern University Transportation Center, May 2021. https://www.transportation.northwestern.edu/docs/2021/20210614_aar-report-final-d-june-2021.pdf.

[214] "Freight Railroads: A 24/7 Link in the Supply Chain." Association of American Railroads. AAR, February 10, 2022. https://www.aar.org/supply-chain.

[215] Young, Anna. "Class I, II & III Railroads Defined in 100 Words." InTek Freight and Logistics Blog - Intermodal, Trucking, Transportation Mgmt. InTek. Accessed May 30, 2019. https://blog.intekfreight-logistics.com/class-i-railroads-defined.

[216] Carlier, Mathilde. "Operating Revenues of U.S. Class I Rail 1990-2019." Statista. Statista, April 6, 2021. https://www.statista.com/statistics/187655/operating-revenues-of-us-class-i-rail-since-1990/.

* The lower bound for the three classes increase annually with inflation, but the 2020 and 2021 thresholds are skewed due to overall decreased revenues resulting from the COVID-19 pandemic

** Canadian National Railway and Canadian Pacific Railway are designated American Class I rail companies, as they own track on American soil

Source: National Transportation Atlas Database; Class I rail lines in the United States (BNSF – orange, Canadian National – yellow, Canadian Pacific – pink, C.S.X. – light green, Kansas City Southern – dark green, Norfolk Southern – red, Union Pacific – blue)

oversees and regulates all activity regarding interstate freight transportation.[217] The classification of railroads arose with the establishment of the S.T.B. in 1995, amidst a push to deregulate the dilapidated industry. Due to the scale and complexity of their operation and infrastructure, the vast majority of Class I freight transportation occurs between major manufacturing cities and international trade ports, such as Los Angeles, Seattle, and Newark.

B. THE NATURAL MONOPOLY OF RAILROADS

While seven primary corporations currently dominate the freight railroad industry, this was not always the case. During the Industrial Revolution, hundreds of railroad companies attempted to establish themselves in the industry, seeing as it was becoming a highly efficient means of transporting goods to and from major cities. Over time, however, many of these companies realized that it would be too expensive to maintain a competitive market. Without extensive government subsidies, the construction of new rail lines that covered the same routes as existing railroad companies' lines proved to be an unnecessary and costly investment for emerging corporations. Furthermore, the additional competition, unwelcome to the established corporations, remained influential enough for such corporations to resort to cooperative, mutually beneficial tactics. This included the consolidation of rail line construction projects, which sparked extensive government regulation. As a result of widespread regulations on freight rail corporations, many of such corporations filed for bankruptcy in the latter part of the 20th century. Most prominently, such major Northeastern transporters as the Penn Central Transportation Company and the Erie Lackawanna Railway Company could no longer sustain themselves, and given their importance to supply chains, the federal government stepped in for

[217] Young, Anna. "Class I, II & III Railroads Defined in 100 Words." InTek Freight and Logistics Blog - Intermodal, Trucking, Transportation Mgmt. InTek. Accessed May 30, 2019. https://blog.intekfreight-logistics.com/class-i-railroads-defined.

support.[218] Congress passed a series of legislative acts to deregulate the freight rail industry and created a sizable general freight railroad company, the Consolidated Rail Corporation (Conrail), to absorb the operations of the newly bankrupt smaller corporations under the Regional Rail Reorganization Act of 1973. With these deregulatory acts – the Staggers Act of 1980 demanded the most significant changes – the government attempted to distance itself from the early 20th-century legislation that caused the freight railroad industry to fall behind the trucking industry. While Conrail was unable to turn a profit prior to the Staggers Act's passage, the corporation became profitable shortly after that, prompting the federal government to reconsider the implications of governing freight rail transportation under the strict authority of the Interstate Commerce Commission and ultimately leading to the establishment of the Surface Transportation Board.

III. REGULATIONS TRIGGER THE BRAKES

A. PUBLIC-PRIVATE PARTNERSHIP

Dating as far back as 1862, the United States government has had a tremendous bearing on the progression of the railroad industry. During the 1850s, The United States Congress spent public funds conducting topological analyses to map out the ideal path of a western railroad along the 32' parallel from the Missouri River to join the existing Central Pacific Railroad of California in Sacramento. However, it left the construction of such a railroad to the private industry when passing the 1862 Pacific Railroad Act.[219] Despite this apparent deference to private investment, Congress remained heavily involved in constructing the first railroad lines, laying the foundation for the subsequent legislation that forced the government to develop future railways. In the 1862 Union Pacific Charter, Congress defined the terms of the election of the Pacific Railway Company (Union Pacific Railroad today) to connect its railroad "through the territories of the United States, the western boundary of the Territory of Nevada, there to meet and connect with the line of the Central Pacific Railroad Company of California." The charter's provisions declared the Pacific Railroad Company "authorized and empowered to layout, locate, construct, furnish, maintain, and enjoy a continuous railroad," with "the right, power, and authority… given to [the company] to take from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof." Despite the superficial autonomy provided to the Pacific Railroad Company by this charter, the government secured a firm grasp on the fate of the company's successes.

The 37th United States Congress set the initial value of the Pacific Railroad Company's capital stock to $1,000 per share, provided the executive branch the authority to nominate two directors to the board of the corporation, and maintained control of the rail line's operations. Due to the looming threat of a civil war, the charter also contained provisions requiring the Pacific Railroad Company to "at all times transmit despatches over said telegraph line, and transport mails, troops, and munitions of war, supplies, and public storage upon said railroad for the government." In exchange for this remarkable deference to the U.S. government, the Treasury

[218] "Consolidated Rail Corporation." Encyclopædia Britannica. Encyclopædia Britannica, inc., n.d. https://www.britannica.com/topic/Consolidated-Rail-Corporation.

[219] "Pacific Railway Act (1862)." Our Documents - Pacific Railway Act (1862). National Archives' Treasures of Congress, n.d. https://www.ourdocuments.gov/doc.php?flash=false&doc=32.

funded much of the project, providing the Pacific Railroad Company with $48,000 in government bonds paid at 6% annual interest for each mile of track laid. As an additional incentive, Congress also offered the company ten miles of land for each mile of track laid. Despite this mutual agreement between the Pacific Railroad Company and Congress, the 1862 Union Pacific Charter allotted the slight government ascendancy after the construction had been completed. It provided Congress the authority to force the company to forfeit its subventions and land grants to the Secretary of the Treasury "for the use and benefit of the United States" should the company fail to comply with its two-year timeline for the construction or fail to redeem its bonds. However, it lacked provisions allowing for specific regulation of the company's operations after the contract's fulfillment. Seeing that the western freight railroad operations market was highly crowded and convoluted, President Lincoln anticipated that it would be profitable in the long run for several of the regional rail companies west of the Missouri River to amalgamate, minimizing squandered investment in adjacent rail lines. In so doing, he incorporated into the Union Pacific Railroad charter the assurance that "at any time after the passage of this act all of the railroad companies named herein, and assenting hereto, or any two or more of them, are authorized to form themselves into one consolidated company." The Union Pacific Railroad charter marked the beginning of a series of significant private investments in freight rail lines, but the U.S. government essentially dismissed President Lincoln's assurance as the industry expanded and anticipated corporate consolidation came to fruition.[220]

From the 1862 charter of the Union Pacific Railroad and 1887, the number of American rail lines increased exponentially. In that time frame, hundreds of new corporations received similar charters from the government to that of the Pacific Railroad Company, and the total distance of constructed track in the United States grew from 30,000 miles to 150,000 miles.[221] However, this rapid development came at a cost for rail companies. As the quantity of privately controlled rail lines grew, the government feared that unchecked railroad proliferation and corporate consolidation would lead to acute price gouging, harming farmers and small shipping companies. Amidst a wave of criticism toward big business, Congress passed the Interstate Commerce Act of 1887, establishing a new regulatory body: the Interstate Commerce Commission (I.C.C.). The I.C.C., which governed all freight rail operations until 1995, mainly served to offset the effects of rail company monopolization, setting a federal restriction on the rates set by freight rail corporations.

B. PRECEDENT FOR RATE REGULATION

The power of Congress to regulate the prices charged by railroad corporations for the transportation of freight is derived primarily from three legislative and judicial assertions: the Constitution's commerce clause, the Supreme Court case *Wabash, St. Louis & Pacific Railway Company v. Illinois, 118 U.S. 557 (1886)*, and the federal charters of new freight companies. Article I, Section 8 of the U.S. Constitution states that Congress has the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes,"

[220] "Transcript of Pacific Railway Act (1862)." Our Documents - Transcript of Pacific Railway Act (1862). United States National Archives, n.d. https://www.ourdocuments.gov/doc.php?flash=false&doc=32&page=transcript.

[221] Rodrigue, Jean-Paul, Claude Comtois, and Brian Slack. The Geography of Transport Systems. 5th ed. London ; New York: Routledge, 2020.

which specifies that the federal government may regulate any trade across state lines. Thus, Congress theoretically possesses the Constitutional latitude to regulate the rates set by freight rail companies to transport goods from one state to another. However, *Wabash, St. Louis & Pacific Railway Company v. Illinois, 118 U.S. 557 (1886)* extends these powers beyond the scope of Congress's Constitutional liberty, thereby establishing the precedent for the federal regulation of freight rail rates serving as the antecedent of the I.C.C.

In *Wabash, St. Louis & Pacific Railway Company v. Illinois, 118 U.S. 557 (1886),* the company had set higher prices for the transportation of freight from Gilman, IL to New York than for the transportation of the same goods from Peoria, IL to New York, even though Gilman is situated 86 miles *closer* to the destination. The State of Illinois considered this practice second-degree price discrimination, and it would later be denoted as such by the Sherman Antitrust Act, which passed in 1890. However, since the portion of the route between the Illinois border and the New York terminus was the same for the Gilman-to-NY shipments and the Peoria-to-NY shipments, the only discrepancies between the two routes existed within the confines of the state of Illinois. Thus, the State of Illinois argued that its legislature should have the power to enact a restrictive policy on this specific trade practice. The Illinois Supreme Court upheld this argument; however, the U.S. Supreme Court's ruling expanded upon the existing commerce clause of the Constitution by reversing the Illinois Supreme Court's decision, holding that even the section of the transportation that occurred only in Illinois was "of a general and national character" and that "regulation can only appropriately exist by general rules and principles, which demand that it should be done by the Congress of the United States under the commerce clause of the Constitution."[222] Essentially, this established that any trade involving the transportation of goods across state lines falls under the sole jurisdiction of the federal government, negating any price discrimination policies set by the Illinois legislature and, more significantly, setting the stage for a broader reach of federal regulation. Finally, the charters of new freight railroad companies were established so that no individual transporter could realistically realize its profit potential. As the subsequent railroad company charters followed the exact delineation as that of the Union Pacific Railroad, the Pacific Railroad Charter serves as an accurate representation of the extent to which Congress limited the growth ceiling for all newly chartered railroad companies prior to 1887. The Pacific Railroad Charter stated, "whenever it appears that the net earnings of the entire road and telegraph…exceed ten per centum upon its cost…Congress may reduce the rates of fare theron…and may fix and establish the same by law."[223] With this curtailment of profits, the federal government effectively discouraged the consolidation of railroad companies, as it would be less advantageous to merge operations without the promise of higher profit margins. While the government publicly divulged its support of such mergers in the charters that were issued, the reality deviated from this significantly in practice, and the number of companies with a stake in the freight rail market continued to grow. The I.C.C. resulted from the culmination of these expansive powers of the federal government to regulate the industry and ultimately slowed further rail construction for much of the early 20th century.

[222] "*Wabash, St. Louis & Pacific Railway Company v. Illinois, 118 U.S. 557 (1886)*." Justia Law, n.d. https://supreme.justia.com/cases/federal/us/118/557/.

[223] "Pacific Railway Act (1862)." Our Documents - Pacific Railway Act (1862). National Archives' Treasures of Congress, n.d. https://www.ourdocuments.gov/doc.php?flash=false&doc=32.

IV. IMPLEMENTATION OF MODERN RESTRICTIVE FEDERAL POLICY

In recent years, the Surface Transportation Board has attempted to broaden the reach of its initially limited power by implementing outdated policies. The Interstate Commerce Act had set three prominent regulations on the freight rail industry, which today guide the majority of the proposed regulations offered by the S.T.B. First, the act required railroad companies to set their rates to be "reasonable and just," dampening the benefits of any market control that individual corporations had established, primarily on a regional level. Second, it prevented companies from offering rebates to manufacturers or shipping companies who transported freight in high volumes, nullifying the benefits of attaining economies of scale. Lastly, the act required that the companies set their prices proportionately to the transportation distance, extinguishing any activity similar to that which prompted the *Wabash, St. Louis & Pacific Railway Company v. Illinois, 118 U.S. 557 (1886)* case.[224] The combination of these three decrees of the Interstate Commerce Act has severely reduced the ability of railroad companies to establish their standing within their respective markets, even after the I.C.C. disbanded in 1995. The effects of this limitation on the freedom of railroad companies remain prominent today, as evidenced by the current autocratic regulation of the industry by the S.T.B.

The S.T.B. continues to implement a rate-setting policy that heavily favors consumers, which acts as yet another impediment to the success of the freight rail industry as a whole. Despite the natural decrease of average per-ton-mile revenue from nearly eight cents to fewer than 5 cents since the passage of the 1980 Staggers Act, the S.T.B. has maintained its position that government intervention is required to keep railroad corporations in check.[225] In keeping with the Interstate Commerce Act's first significant regulation, the S.T.B. has proposed eliminating its elaborate Final Offer Rate Review policy, which provided consumers the ability to contest the transportation rate set by a private corporation and redirect the responsibility of setting the rate to the S.T.B. In place of this relatively neutral policy, the S.T.B. has proposed implementing a policy that allows consumers to contest any price set by a private railroad company and suggest a new price. Under this proposal, should the S.T.B. determine that the new price is simply *fairer* than the original price, the railroad company is forced to accept the consumer's suggested price. Essentially, this policy provides little flexibility and discretion to the corporation itself and instead would frequently subject it to operating below the market equilibrium rate.

The reach of the S.T.B.'s current policy extends well beyond merely supporting the consumer. One of how private railroad companies increase their efficiency in transporting goods to manufacturers is the process of reciprocal switching. Reciprocal switching allows a given railroad company to transfer the duty of transporting a rail car to a manufacturer to a different railroad company that has railroad lines on a more efficient route. Naturally, the railroad company that operates on the more direct railroad lines charges a fee for accepting this duty from its competitor, upon which the participating corporations agree through private negotiations.[226]

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[224] "The Interstate Commerce Act Is Passed." U.S. Senate: The Interstate Commerce Act Is Passed. United States Senate, December 12, 2019. https://www.senate.gov/artandhistory/history/minute/Interstate_Commerce_Act_Is_Passed.htm.

[225] Average Rates Down Chart. Association of American Railroads. AAR, n.d. https://www.aar.org/wp-content/uploads/2020/06/AAR-Average-Rates-Down-Chart.jpg.

[226] "Forced Switching Is Forced Inefficiency." Association of American Railroads. AAR, February 28, 2022. https://www.aar.org/forced-switching.

Under current statutes, the Surface Transportation Board may initiate "forced switching," a modification of reciprocal switching in which an agreement is artificially enacted, if one of the involved parties files a claim that the other is intentionally setting unrealistic prices for anti-competitive purposes. Recently, however, the S.T.B. has proposed to enact legislation that would allow it to require railroad companies to engage in reciprocal switching without deciding that one party has employed anti-competitive negotiation tactics. The S.T.B. claims it has the authority to regulate this process in such a way, citing "49 U.S.C. § 11102(c)(1). Section 11102(c)(1) authorizes the Board to establish the conditions of and compensation for switching service if the affected carriers cannot reach agreement on those matters within a reasonable period." In the short term, this regulation may appear to increase the operational efficiency of the supply chain. However, it neglects to account for the costs to the railroad companies of losing the ability to set their rates for reciprocal switching, severely restricting the natural procession of the market. Moreover, in the long run, this proposed regulation would disincentivize operational volume from the freight rail industry and instead promote less efficient means of freight transportation, including that which occurs by truck. Furthermore, the Surface Transportation Board's assumption of regulatory duty on the issue of reciprocal switching relies on the precedent set by its now-defunct predecessor, the Interstate Commerce Commission, which claimed that the government has the responsibility to regulate this process should it determine that it "is necessary to remedy or prevent an act that is contrary to the competition policies of 49 U.S.C. [§] 10101 or is otherwise anti-competitive." Not only does this unprompted assumption of power violate the "necessary" premise of the I.C.C. statute, but it also disregards the purpose of the I.C.C.'s disbandment: to attain laissez-faire governance of the freight railroad industry as per United States federal deregulatory policy established in the 1980s, which came into effect as the government began to take into account the crippling effects of restrictive federal regulations on the freight railroad industry and the rapid rebound of its newly chartered Conrail corporation.

In the last two decades, the United States government has sought to pass legislation to subsidize rail transportation and maintain its supporting infrastructure. However, this also came at the price of setting a precedent for further regulation. President Obama's American Recovery and Reinvestment Act of 2009 allotted several billion federal dollars toward redeveloping significant rail systems. Similarly, President Biden's Bipartisan Infrastructure Deal invests tens of billions of dollars toward reestablishing rail transportation. However, both of these laws focus primarily on passenger rail transportation, despite allowing the government to utilize private railroad lines for its benefit. The Surface Transportation Board currently allows utility companies to use private freight railroad lines for their operations. The railroad companies have objected to this, claiming that this comes at a cost to the safety of their operations. However, the federal subsidy has an overwhelming impact on the freedom of the railroad companies' operations.

V. CONCLUSION

Any single factor or historical development cannot characterize the downfall of the freight railroad industry. Indeed, modern port logistics are far more complex than they were at the peak of the Industrial Revolution, in large part due to the exponential growth of the global economy in the past 150 years. Such growth would have been undeniably impossible had supply

chains solely relied on the railroad industry, as the cost of investing further in rail infrastructure far exceeds that of building and maintaining roads. However, there remains a need for rail-based freight transportation in our modern supply chains, as pandemic-induced consumer behavior revealed the widespread preference for the convenience and cost of e-commerce.[227] The cost of reestablishing railroads as the primary means of industrial transportation would likely be minimal in some nation areas. Due to the significant decline of the industry in the 20th century, the United States currently possesses thousands of miles of unused or abandoned railroad infrastructure that could be repurposed. The most

Source: Surface Transportation Board – Abandoned and Railbanked Rail Lines Map; abandoned (red) and railbanked (green) Class I railroad lines in the continental United States.[228]

intriguing example of this is Wisconsin, where the state government has implemented an abandoned rail line buyback initiative to avoid wasted land and resources. Once a corporation abandons a railroad line, the surrounding land is often redistributed to the local, state, or federal government. The issue with such plans lies in the administrative control possessed by the government following such acquisitions. These programs will likely become more widespread in the coming years, but much of the land and infrastructure could be repurposed for services like Amtrak, which is operated under the government's jurisdiction. America has witnessed the dangers of such overwhelming government control on private industry, so it remains to be seen whether this type of development can be executed sustainably. In the near term, a resurgence of the freight rail industry cannot feasibly alleviate the strains of the COVID-19 pandemic on American and international supply chains, which have crippled industries and caused prices to soar. In reality, truck-based transportation has proven more resilient during economic crises.

[227] Schofer, Joseph L, Hani S Mahmassani, Max T.M. Ng, and Breton L Johnson. "The U.S. Railroads and Covid-19: Keeping Supply Chains Moving." Northwestern University Transportation Center, May 2021. https://www.transportation.northwestern.edu/docs/2021/20210614_aar-report-final-d-june-2021.pdf.

[228] "Abandoned and Railbanked Rail Lines." Map Viewer. Surface Transportation Board, n.d. https://stb.maps.arcgis.com/apps/mapviewer/index.html?webmap=59c5662600854756a7e6f18bca1a0f44.

After the onset of the Great Recession, rail-based transportation suffered to a greater extent concerning the decline in production.[229] However, the benefits of rail-based transportation that initially drew public and private entities to invest copiously in its expansion remain valid and relevant today. Rail can be considered the first option for transporting goods within the domestic supply chain. Regulatory bodies should be mindful of the importance of allowing private railroad corporations to attain their potential for the broader benefit of the nation's economy.

[229] Schofer, Joseph L, Hani S Mahmassani, Max T.M. Ng, and Breton L Johnson. "The U.S. Railroads and Covid-19: Keeping Supply Chains Moving." Northwestern University Transportation Center, May 2021. https://www.transportation.northwestern.edu/docs/2021/20210614_aar-report-final-d-june-2021.pdf.

The Impact of Restrictive Immigration Policies on Immigrant Entrepreneurs and the U.S. Economy

Iris Shi

Abstract.

The article opens with an overview of the current state of immigration affairs, followed by a list of its arguments in favor of encouraging immigrant entrepreneurship. Part I provides a brief overview of historical immigration restrictions in the U.S., starting with the shift of attitude in the late 1800s when immigration was initially welcomed. A brief overview of the current immigration restrictions is provided to establish the current immigration environment and political climate. In Part II, the introduction emphasizes the lack of startup visas and the unsuitability of the available visa categories. The flaws of the H-1B visa, E-2 visa, and EB-5 visas are pointed out as their parameters are explored in depth. These restrictive policies are then compared to the efforts of other countries creating less restrictive immigration processes. Part III analyzes the flaws of the previously mentioned U.S. immigration policies and discusses why these flaws impact the country as a whole and on an individual scale. Potential solutions aimed to boost the startup scene within the U.S. are proposed.

I. INTRODUCTION

For decades, the U.S. has been the pinnacle of global innovation and the world's most robust economy. The First Amendment, American exceptionalism, and the education system provide incentives for risk-taking entrepreneurship. Another essential factor of the thriving U.S. economy is the immigrants that bring together their different backgrounds and methods of thinking within the U.S. The number of firms founded per immigrant is higher than that of firms founded by U.S.-born entrepreneurs. From 2005-2010, 0.83% of immigrants in the workforce started firms, while 0.46% of native-born individuals did. Immigrants are 80% more likely to start businesses than those born in the U.S. As a whole, immigrants start a wider variety of businesses, and they are also 35% more likely to hold a patent than native-born founders. Additionally, immigrant-founded firms create 42% more jobs than native-born-founded firms relative to each population size.[230]

Despite this success, the U.S. immigration system has created obstructions for immigrant entrepreneurs. From the Chinese Exclusion Act of 1882 to the Muslim Travel Ban of 2017, naturalization policies discriminate against individuals based on race and class. In recent years, the increasing politicization of immigrant entrepreneurship has led to increasingly restrictive policies, such as those imposed by the Trump administration, and facilitated the stagnation of progressive immigration bills. Meanwhile, other countries strive to attract the talent of immigrant entrepreneurs rather than suppress it. Since native-born entrepreneurs are inefficient substitutes for immigrant entrepreneurs, the loss of global talent will damage the future economic health of the U.S.

By examining the historical and economic impacts of immigration, this article will argue in favor of encouraging immigrant entrepreneurship. First, it provides the effects of past and present restrictive U.S. policies aimed at immigrant entrepreneurs; second, it compares U.S. immigration policies with other countries; and third, it discusses the efficiency of the LIKE Act. This article finds that creating obstructions for immigrant entrepreneurs will contribute to the U.S. losing its reputation as the beacon of innovation.

II. EFFECTS OF RESTRICTIVE U.S. POLICIES ON IMMIGRANT ENTREPRENEURS

A. A BRIEF OVERVIEW OF HISTORICAL IMMIGRATION RESTRICTIONS

Since the country's birth, immigration policies within the U.S. have fluctuated between accepting and restricting attitudes. During the 1700s and early 1800s, immigration was encouraged. In the late 1800s, as immigration increased and economic conditions took a downturn, the Supreme Court declared the regulation of immigration a federal responsibility and, in 1875, began passing restrictive immigration legislation. The Chinese Exclusion Act of 1882 was the first policy to target individuals by race and limit their entry and eligibility for citizenship. As U.S. immigration peaked in the early 1900s, xenophobia saw a sharp rise during

[230] Meredith Somers, *Why Restrictive Immigration May Be Bad for U.S. Entrepreneurship*, MIT Sloan (Sept. 17, 2020), mitsloan.mit.edu/ideas-made-to-matter/why-restrictive-immigration-may-be-bad-u-s-entrepreneurship.

WWI. Regulations such as the Immigration Act of 1924 established strict national origins quotas to limit the number of immigrants further. This act was designed to favor those of Northern and Western European origin and wholly excluded immigrants from Asia except for the Philippines, an American colony. The Immigration Act of 1924 was the primary document governing immigrant eligibility within the U.S. until 1965. Unable to enter the country, many immigrants lacked the opportunity to start businesses and contribute economically within the U.S. In the twenty-first century, there are still policies that restrict foreign talent and obstruct the path for immigrant entrepreneurs. For example, the Trump administration took a hostile stance against immigration, such as the Muslim Travel Ban of 2017 that prevented citizens of Iraq, Syria, Iran, Libya, Somalia, Sudan, and Yemen from entering the U.S. The Biden administration remains stagnant in making reforms to the immigration system.[231] In the 2021 case of Sanchez v. Mayorkas, the Court decided that temporary protected status does not guarantee entry nor allow noncitizens to obtain permanent resident status.[232]

B. A BRIEF OVERVIEW OF CURRENT IMMIGRATION RESTRICTIONS

Current immigration visa policies lead to the loss of foreign intellectual capital, foreign direct investment, and jobs within the United States. Restrictions placed upon immigrants limit their employment options in their early careers, which later negatively impacts their entrepreneurial opportunities. People with immigration-related restrictions, such as foreign nationals with temporary work visas, are less likely to be entrepreneurs after graduation than people without restraints, such as immigrants and native-borns with permanent residency or citizenship.[233]

Current visa laws, such as the OPT policies, require the jobs of newly graduated immigrants to be closely related to their field of educational training. If immigration-related work limitations are lifted, the probability of immigrant entrepreneurial entry will increase.[234] High fees and complicated paperwork cause immigrant graduates to stray away from early-career startups. Under current legal permanent residency application rules, no minimum time is required for the immigrant employee to stay within the sponsored position. However, immigrants remain with their sponsoring employers for long periods and sometimes up to years, since changing their job after a too short period would cause the sponsorship to be fraudulent and null the employment-based green card application. This furthers immigrants away from gaining the skills and interests required for entrepreneurship.

Visa cap policies have already created detrimental impacts on the U.S. economy. After the H-1B visa caps were reduced to 65,000 annually in 2004, the quality of the international students that applied for visas fell, which reduced the inflow of intellectual capital into the

[231] *Timeline*, Immigration History (June 22, 2020), immigrationhistory.org/timeline/.

[232] *Cases - Immigration and Naturalization*, Oyez, www.oyez.org/issues/164.

[233] National Science Foundation's Scientists and Engineers Statistical Data System (SESTAT), https://www.nsf.gov/statistics/sestat/#:~:text=SESTAT%20is%20the%20Scientists%20and,U.S.%20science%20and%20engineering%20workforce.

[234] *How U.S. Immigration Policies Stifle Immigrant Entrepreneurship | Maryland Smith*, Maryland Smith Research (Oct. 26, 2021), www.rhsmith.umd.edu/research/how-us-immigration-policies-stifle-immigrant-entrepreneurship.

country.[235] H-1B policies have also caused multinational firms to shift tens of thousands of overseas jobs to new foreign affiliates.[236] Furthermore, visa caps have driven STEM Ph.D. students back to their home countries, where they can advance in their careers more efficiently than if they stayed in a single job in the U.S. while waiting for a green card. The number of native-born and American citizen PhDs in STEM fields is smaller than the amount demanded by U.S. employers. Nevertheless, these STEM fields are among the most crucial fields in stimulating U.S. economic growth.[237]

Elon Musk, who launched Paypal, Tesla, and SpaceX, did not have a green card and had to secure an EB-5 immigrant investor status to launch his startups.[238] Eric Yuan, founder and CEO of Zoom was denied eight times by the U.S. Department of State when he applied for a temporary work permit. After two years, on his ninth try in 1997, he finally obtained his H1-B visa.[239] These two men are prime examples of how Immigrant founders provide invaluable contributions and innovations to the U.S. economy and show that the restrictive policies that hinder immigrant economic advances will be detrimental to the United States.

III. ANALYSIS OF IMMIGRATION ENTREPRENEURIAL POLICIES

The U.S. visa application process is often lengthy and complicated. There are no startup visas for immigrant founders, so many must resort to unsuitable visa categories. These visas' restrictive eligibility requirements and conditions leave immigrant families uncertain about their futures in the United States. The Trump administration has pushed for a merit-based immigration system, leading to further denials and delays in visa issuing. Meanwhile, other countries strive to improve their startup scene by attracting immigrant entrepreneurs with startup visas and a lack of obstructions. Immigrants prefer a location with more permanent and free investment over being restricted by a work visa for over a decade. By comparison, the United States' restrictive immigration policies prevent the flow of immigrant entrepreneurs into the country and create adverse effects on the country's economic health.

A. H-1B VISAS

The H-1B visa is the primary means for skilled immigrant workers to enter the U.S., and these visas are heavily relied on by U.S. companies to hire foreign employees. For those who hold this

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[235] Takao Kato & Chad Sparber, *Quotas and Quality: The Effect of H-1B Visa Restrictions on the Pool of Prospective Undergraduate Students from Abroad*, The Review of Economics and Statistics, MIT Press (Mar. 1, 2013), direct.mit.edu/rest/article/95/1/109/58045/Quotas-and-Quality-The-Effect-of-H-1B-Visa.

[236] Britta Glennon, *How Do Restrictions on High-Skilled Immigration Affect Offshoring? Evidence from the H-1B Program*, NBER (Jul. 21, 2020), www.nber.org/papers/w27538.

[237] *Issue Brief: Complex U.S. Immigration System Limits Entrepreneurship, Innovation - Snider Focus: Because the Why Matters*, Ed Snider Center for Enterprise & Markets (Oct. 22, 2021), edsnidercenter.org/issue-brief-complex-u-s-immigration-system-limits-entrepreneurship-innovation/.

[238] *How U.S. Immigration Policies Stifle Immigrant Entrepreneurship | Maryland Smith*, Maryland Smith Research (Oct. 26, 2021), www.rhsmith.umd.edu/research/how-us-immigration-policies-stifle-immigrant-entrepreneurship.

[239] *Issue Brief: Complex U.S. Immigration System Limits Entrepreneurship, Innovation - Snider Focus: Because the Why Matters*, Ed Snider Center for Enterprise & Markets (Oct. 22, 2021), edsnidercenter.org/issue-brief-complex-u-s-immigration-system-limits-entrepreneurship-innovation/.edsnidercenter.org/issue-brief-complex-u-s-immigration-system-limits-entrepreneurship-innovation/.

visa, any change in their job status would force them to restart the Green Card application process. Green Cards are allotted by country, and citizens of populous countries can wait for over ten years to receive one.[240] 85,000 H-1B visas are issued annually, which means that over two-thirds of applicants are not granted visas.[241] The Trump administration narrowed visa requirements: H-1B workers employed at third-party worksites must have documentation proving that they perform the jobs they were hired for when they received the visa. When restricted to narrow career paths, these immigrants are less likely to develop the skills needed for entrepreneurship and enter the field, further limiting foreign talent from growing within the United States.

B. E-2 VISAS[242]

To be eligible for the E-2 visa, an investor must have invested substantial capital in U.S. bona fide enterprises, must be seeking the visa for the development of the enterprise, and have at least 50% ownership of the enterprise. In addition, the investor must be from one of the 82 treaty countries whose citizens can receive the E-2 visa. *Treaty countries* are countries with which the U.S. has a treaty of commerce and navigation or an international qualifying agreement.[243] However, populous countries such as China, India, Brazil, and Russia are not classified as treaty countries; therefore, their citizens are not eligible for this visa.

There are other general requirements for employees of treaty investors. The investor and employee may only perform work related to the activity approved when the E-2 visa was granted, restricting workers from exploring options outside of their field. The maximum initial stay is two years, with requests for extensions offered in two-year increments. Visa holders must agree to leave the country after their status expires. From 2009 to 2016, the number of E-2 visas issued increased from 24,033 to 44,243. However, in 2017, there was an increase in total applications but a decrease in the number of visas issued. This was due to the high number of visa refusals, with 14,080 applications being denied, making it the highest number of refusals since the implementation. The most common reason for visa denial is not having sufficient proof of funding. The strict requirements for E-2 visas, along with the falling rate of E-2 approval, make these visas a non-viable option for immigrants looking to start their businesses.

C. EB-5 VISAS[244]

Also known as the Immigrant Investors Program, no more than 10,000 EB-5 visas are available each year. To be eligible for the EB-5 visa, investors must invest in commercial enterprises established after November 11, 1990, which excludes investment in noncommercial

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[240] *H-1B Specialty Occupations, DOD Cooperative Research and Development Project Workers, and Fashion Models*, U.S. Citizen and Immigration Services (Oct. 28, 2021), www.uscis.gov/working-in-the-united-states/h-1b-specialty-occupations.

[241] *Id.*

[242] Courtney Kaiser, *U.S. Immigration Policy: A Barrier to Immigrant Entrepreneurs, Innovation, and Startup Growth?*, 51 U. Mia Inter-Am. L. Rev. 141 (2019).

[243] *E-2 Treaty Investors,* U.S. Citizenship and Immigration Services (Nov. 12, 2021), https://www.uscis.gov/working-in-the-united-states/temporary-workers/e-2-treaty-investors

[244] Courtney Kaiser, *U.S. Immigration Policy: A Barrier to Immigrant Entrepreneurs, Innovation, and Startup Growth?*, 51 U. Mia Inter-Am. L. Rev. 141 (2019).

activity and requires that the capital invested be sufficient to create at least ten full-time positions. Between 2015 and 2018, around 80% of the EB-5 visas issued were given to immigrants from Asia. However, after 2018, a decline in EB-5 visas issued to Asian immigrants occurred.

IV. INTERNATIONAL ALTERNATIVES

In 2018, Canada launched the Startup Visa Program to welcome more immigrant entrepreneurs into the country, specifically targeting those who are innovative, create jobs, and can compete on a global scale. The Startup Visa takes between twelve and sixteen months to process and allows applicants to apply for a temporary work permit during the wait. The permanent-resident process, the Canadian equivalent of a Green Card, is simple and easy as it takes less than six months to complete. This is more attractive to immigrant entrepreneurs than the lengthy processing time and visa policies of the U.S.[245] Due to Canada's more open immigration policy and political climate, Canada is attracting an increasing number of entrepreneurs and innovators. This led to increased tech firms, startup and tech activity, and venture capital investment. In 2017, Toronto added more tech jobs than any other North American city. [246]

The Chilean government is also working to improve the startup scene in the country. In 2010, Chile launched the Startup Chile accelerator to promote Chile as a center of innovation in Latin America and create an entrepreneurship culture. The program is currently among the top 10 global accelerators as it provides companies with training, assets, and working visas. Applicants, founding team members of the startup, and family members are all eligible for a working visa through this program. Visa Tech Chile, the technological sector of Start-Up Chile, has created a temporary work visa to be obtained within fifteen working days. The program coincided with a period when innovators regarded the U.S. immigration policy as complicated and lengthy. This further contributed to its success and drew in foreign talent, generating $700 million in global sales.[247]

V. FLAWS AND POTENTIAL SOLUTIONS OF CURRENT U.S. IMMIGRATION POLICIES

A. RELEVANCE OF FLAWS

Immigration laws failed to consider several potentially detrimental effects on the United States' economy at the federal and state levels. Immigration-related restrictions have led to increased job loss, fewer students and entrepreneurs entering the country, less intellectual capital, and decreased foreign direct investment to other countries. This reduction of global collaboration inevitably causes U.S. firms to lose competitiveness in the global market, damaging the country's future economic health. The current push for a merit-based immigration system has led to further

[245] *Start-up Visa Program,* Government of Canada (Sep. 18, 2020), https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/start-visa/about.html

[246] Courtney Kaiser, *U.S. Immigration Policy: A Barrier to Immigrant Entrepreneurs, Innovation, and Startup Growth?*, 51 U. Mia Inter-Am. L. Rev. 141 (2019).

[247] *Id.*

visa denials and delays, exacerbating this problem further. According to the National Academies of Sciences, Engineering, and Medicine, skilled immigrants are often employed alongside native-born workers, not in place of them, creating minimal, overall nonexistent, negative impacts on native-born wages and employment. As immigration has a positive impact on long-run economic growth and leads to small increases in wages of natives across all education levels, especially those with complementary skills, the restriction of immigration bars this avenue for increasing individual wages.[248]

The immigration quotas of the 1920s aimed to reduce immigration inflow. However, no evidence restricting immigration has led to positive economic effects, only that these quotas led to a decline in the wages of native-born and unrestricted groups. Earnings declined by 0.5 percent for every one percentage point difference in quota exposure in urban areas and by 0.3 percent for every one percentage point difference in quota exposure in rural areas due to the changes in workforce demographics.[249] As workers took on the low-skilled jobs in cities previously held by immigrants, the average earnings declined.

Since the immigrant labor force increases productivity and production, they benefit U.S. consumers by reducing the prices of goods and services. A strong immigrant workforce also creates a dynamic workforce, allowing the U.S. to avoid stagnant economies created by homogenous demographics. These national consequences of immigrant labor mean that all people in the U.S. are impacted by the increased innovation, entrepreneurship, technological change, and patents per capita that immigration creates. Restrictive policies that discriminate against ethnicity and class create uncertainty in the lives of immigrants and their children.

B. POTENTIAL SOLUTIONS

From 2004 to 2019, the U.S. share of global venture capital fell from 84% to 52%.[250] In order to stimulate the economy, visa reforms must be made to attract innovators and entrepreneurs from around the world to the U.S. H-1B visas and other visa programs have led to the inflow of high-skilled immigrant workers; therefore, reforming visa regulations would ensure that talented and eligible applicants are allowed into the country. Visa regulation reforms should strive to mirror the open immigration policies of both Canada and Chile. Lowering the waiting time of the visa application process and raising visa caps would attract more entrepreneurs. Visa policies should also attract entrepreneurs with innovative qualities and global mindsets.
On July 26, 2021, Congresswoman Zoe Lofgren introduced H.R. 4681, the Let Immigrants Kickstart Employment act. The Bill was referred to the Committee on the Judiciary, and July 26, 2021, is still the last action date listed. The LIKE Act creates temporary visas and opportunities for permanent residence for those affiliated with startup entities.[251] The LIKE Act applies to

[248] *The Economic and Fiscal Consequences of Immigration*, National Academies of Sciences, Engineering, and Medicine (2017), https://doi.org/10.17226/23550.

[249] Ran Abramitzky, Philipp Ager, Leah Platt Boustan, Elior Cohen, and Casper W. Hansen, *The Effects of Immigration on the Economy: Lessons from the 1920s Border Closure*, National Bureau of Economic Research, (2017).

[250] *Immigrant Entrepreneurs Can Drive Economic Growth in the Pandemic Recovery*, National Venture Capital Association (Mar. 2021), https://nvca.org/wp-content/uploads/2021/03/NVCA_Visa_Reforms_book_FINAL.pdf

[251] *H.R. 4681 (IH) - Let Immigrants Kickstart Employment Act of 2021*, Govinfo, U.S. Government Publishing Office (2022), www.govinfo.gov/app/details/BILLS-117hr4681ih/summary.

startups that meet growth benchmarks and whose founders have a record of business development success.

However, the disadvantages of visa reforms to increase inflow are most evident at the state and local levels, where the fiscal impacts of immigrants widely vary. According to the Penn Wharton Budget Model, regionally, the net fiscal impact of first-generation immigrants is negative as immigrants utilize the same government services as American-born citizens but, on average, pay fewer taxes. Foreign-born workers are also heavier tax burdens at state and local levels because they tend to have more children as a demographic. Consequently, this places a heavier burden on states' education systems, which are generally the most significant component of state and local budgets.[252]

These costs are only short-term strains on state and local budgets, offset by immigrants' positive contributions to the federal budget. In fact, after the age of 60, native-born citizens become more costly to the government because immigrants generally have lower Social Security and Medicare expenses, which are the most significant components of the federal non-defense spending budget. Due to their higher education and income level, second-generation immigrants are among the highest fiscal and economic contributors to government revenue.[253] Overall, reforming visa policies through methods such as the LIKE Act to create an open environment for immigrant startups would ensure an increased inflow of global talent.

VI. CONCLUSION

By creating large numbers of businesses and jobs while transforming startups into some of the most successful companies in the U.S., immigrants have been a major contributing factor to the strength of the U.S. economy. Fifty percent of current high-growth companies were founded by immigrants and first-generation people in the U.S., and startups create around 3 million new net jobs per year.[254]

Historically, the U.S. immigration system has created barriers for immigrants that have, in turn, negatively impacted the U.S. economy. The Chinese Exclusion Act of 1882, the Immigration Act of 1924, the Muslim Travel Ban, and Sanchez v Mayorkas are only a few examples of attempts to restrict immigration. Currently, the U.S. is losing its position as the leading global economy due to restrictive immigration policies creating losses of jobs, investment, and capital. Meanwhile, other countries are striving to improve their startup scene by attracting immigrant entrepreneurs worldwide. Empirical evidence demonstrates that restrictive immigration policies harm the economy like those currently enacted in the United States. Many entrepreneurs and innovators favor creating startups in other countries; for those who do resort to creating a startup within the U.S., narrow visa requirements create huge disparities between the total number of applications and the number of issued visas.

Since immigrant entrepreneurs are significant contributors to the U.S. economy, a potential solution for the U.S. to maintain its top position within the competitive global market is

[252] Wharton PPI, *The Effects of Immigration on the United States' Economy*, Penn Wharton Budget Model, Penn Wharton Budget Model (Dec. 19, 2018), budgetmodel.wharton.upenn.edu/issues/2016/1/27/the-effects-of-immigration-on-the-united-states-economy.

[253] *Id.*

[254] *Immigrant Entrepreneurs Can Drive Economic Growth in the Pandemic Recovery*, National Venture Capital Association (Mar. 2021), https://nvca.org/wp-content/uploads/2021/03/NVCA_Visa_Reforms_book_FINAL.pdf

to reform policies to create an open environment for immigrant startups. Having a U.S. visa tailored to the startup industry with a short application process would attract global talent, preventing the United States from losing its economic advantage to countries with more favorable visa laws. Allowing immigrants to explore fields outside their training field would allow immigrants to develop entrepreneurial skills. Instead of restricting immigrant entrepreneurs, nurturing, attracting, and supporting the innovation and entrepreneurship brought in by immigrants would allow the U.S. to maintain its reputation as the beacon of innovation.

De Facto Legalized Global Heists: Offshore Financial Centers Allow the Ultra-Wealthy to Avoid Taxation

Eiman Siadati

Abstract.

The business of international tax evasion represents a multibillion-dollar industry allowing the rich and powerful to avoid paying their fair share. The result: billions of dollars funneled into unmonitored bank accounts in locales such as the Cayman Islands, the City of London, or the Netherlands. This deprives national governments around the world of much-needed tax revenue to fund their operations, especially amidst dire global crises such as climate change and rising mass migration. The impact is especially acute in developing countries in the global South–after the catastrophic damage incurred during colonization, global trade systems continue to perpetuate the power of Western multinational corporations. Specifically, the prominent methods of tax evasion are *de facto* legalized without many legal pathways for national governments to recover lost tax revenue. Two court cases in the United States, however, shine light on potential methods to crack down on tax avoidance as well as chipping away at its legality: *United States of America v. Walter Anderson* and *Altera Corporation & Subsidiaries v. Commissioner of Internal Revenue*, respectively. Ultimately, the currently-proposed solutions to this global issue can happen at either the national or international level, but none are comprehensively potent or feasible. Potential solutions include strengthening national tax collection agencies to multinational organizations. The reasons for this are wide-ranging: the large variety of different countries' attitudes towards taxation and their own specific regulations to an inevitable impotence of a global bureaucracy. The sheer economic resources that national governments are deprived of through tax avoidance makes solving this global issue key to combat the crises of this century. Simply put, tax havens are relics of an exploitative economic system continuing to immensely benefit individuals and corporations. Their abolition is necessary.

I. INTRODUCTION

The desire to save as much money as possible for many multinational corporations and individuals is virtually unsatisfiable. To this end, many seek to sidestep what they must rightfully pay through taxes and other fees imposed by governments around the world through tax havens. Tax havens, as the name suggests, are places where wealth would not be subjected to the typical taxes found in most countries. As free trade has become globalized over the past few decades, tax havens have found an increasingly important role in the protection of wealth from taxes. Furthermore, the globalization of free trade has also allowed an ever easier transfer of wealth into these locales. The result has been clear–an unchecked accumulation of wealth in the hands of the ultra-rich through tax havens.[255]

Firstly, the question of what exactly a tax haven is must be addressed. Tax havens generally contain three characteristics: they uphold little to no tax rates, little financial regulation, and they are secrecy jurisdictions. The first and second characteristics demonstrate how money deposited in banks in tax havens is allowed to sit in their accounts untaxed. The third characteristic is the status of a secrecy jurisdiction which grants anonymity to those who wish to store their money in tax havens away from prying eyes. Additionally, secrecy jurisdictions criminalize the unauthorized disclosure of any financial information.[256] With these preceding characteristics, tax havens are sought after by multinational corporations and individuals as safes for their wealth from other governments' taxes.

The typical person's initial image of a tax haven might be that of the Cayman Islands or some other tropical paradise. This is partially true: the Cayman and British Virgin Islands are some of the most prominent offshore financial centers in the world. However, they only fall into one type of tax havens.[257] This category of tax havens is known as sink offshore financial centers and they are the final destinations of wealth sent to sit in tax-free. They also meet the criteria for the definition of a typical tax haven as outlined in the previous paragraph.[258] The second type of tax haven is known as a conduit offshore financial center. Conduit offshore financial centers are locales—municipalities or whole nations—that make the transfer of wealth to sink offshore financial centers seamless. Essentially, they act as the intermediary step in the wealth transfer process. They also offer another key benefit: low or no taxes on the international transfer of wealth. Primary examples of conduit offshore financial centers include the Netherlands and the Republic of Ireland.[259] These are just two types of tax havens yet these two provide the foundation for the worldwide circumvention of tax payment.

Considering the malicious intent of those who seek to stash their money away in offshore accounts, questions of legality, morality, and the amount of lost tax revenue in tax havens must be addressed. Another pressing concern is the degree to which this lost revenue has been

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[255] Shaxson, Nicholas. "Tackling Tax Havens." IMF F&D, September 2019. https://www.imf.org/external/pubs/ft/fandd/2019/09/tackling-global-tax-havens-shaxon.htm.

[256] Fitzgibbon, Will, and Ben Hallman. "What Is a Tax Haven? Offshore Finance, Explained." ICIJ, January 5, 2021. https://www.icij.org/investigations/panama-papers/what-is-a-tax-haven-offshore-finance-explained/.

[257] Wallach, Omri. "Mapped: The World's Biggest Private Tax Havens." Visual Capitalist, July 9, 2021. https://www.visualcapitalist.com/worlds-biggest-private-tax-havens/.

[258] Garcia-Bernardo, Javier et al. "Uncovering Offshore Financial Centers: Conduits and Sinks in the Global Corporate Ownership Network." *Scientific reports* vol. 7,1 6246. 24 Jul. 2017, doi:10.1038/s41598-017-06322-9 https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5524793/.

[259] Ibid.

hampering developing countries' efforts to reduce poverty within their borders. This research explores the historical creation of the globe's current trade system and its tax havens, considering how individuals and corporations go about utilizing them. The sheer magnitude of the financial loss to tax avoidance is also discussed. In a globalized world with many types of regulations varying from country to country, there is no "one size fits all" solution. Fortunately, there are several methods that are worth investigating examined in further detail through this research. These include changes to national laws on how businesses operate in their base country to bilateral agreements that trade financial information between countries. In a world marked by increasing wealth inequality, war, and climates crises, the funds potentially made available through reducing tax avoidance would be crucial.

II. BACKGROUND

A. A NEW, GLOBALIZED WORLD

The world's various continents have been interconnected since the dawn of colonialism. However, the current system of world trade only came into fruition during the waning months of the Second World War. This system was the result of a monumental agreement among Allied countries at the Bretton Woods Conference in 1944.[260] Specifically, the conference laid the groundwork for today's system of relatively free trade around the world. Economic conditions and trade restrictions from beforehand had several key differences to this new system.

Before the Second World War, many countries like the United States relied on protectionist trade policies that resulted in a strong control on revenue flows. This allowed the United States and other Western countries to industrialize and protect their industries from foreign competition.[261] These protectionist policies alongside Keynesian economics and developmentalism allowed countries in the Global North as well as the Global South to advance their economies and develop as a result.[262] Furthermore, with the abovementioned capital flow controls, any transfer of wealth across national borders was strictly controlled and interrogated. Protectionist economic policies were the norm until only a couple of decades ago.

The 1980s saw the ascendance of neoliberalism across the world and its clamoring for unrestricted trade between as many countries as possible. This is also known as free trade. This trend culminated in the foundation of the World Trade Organization. Membership in this new organization was virtually required for all countries around the world under the threat of losing out on access to world markets. Additionally, membership in the World Trade Organization required the deregulation of capital flows in member states so as to allow transfers of wealth seamlessly.[263] This ultimately enabled the current plague of tax avoidance through offshore financial centers.

B. THE CREATION OF TAX HAVENS

[260] Hickel, Jason. *The Divide: Global Inequality from Conquest to Free Markets*. New York, NY: W.W. Norton & Company, 2018. Pg. 103.
[261] Ibid. Pg. 175.
[262] Ibid. Pg. 105.
[263] Ibid. Pg. 177.

Tax havens are artificial creations in the worldwide system of free trade manufactured in two separate backdrops. Firstly, the predominant collection of tax havens around the world were organized by the former British colonial empire. Britain established its Crown dependencies, such as Jersey or the Isle of Man, as well as its Overseas Territories, such as the Cayman Islands or Gibraltar, as nodes in its new tax haven system for British corporations. Other notable tax haven examples include former British colonies such as Dubai and the Bahamas. The most significant point in this network, however, is in the middle of mainland Britain–the City of London. The City of London, not to be confused with London itself, is a council area, or neighborhood, within the larger city immune to many of Britain's laws, regulations, and oversight. For this reason, the City of London is a beating heart in the business of tax avoidance.[264] There are also other European tax havens that have sheltered Western multinational corporations: Ireland, Luxembourg, the Netherlands, and Switzerland are the most prominent.[265] The result of the formation of these networks is the enabling of a continued, exploitative transfer of wealth from poor countries to rich ones, similar to colonialism. The nefarious aims of imperialists, however, has not been the only cause for the establishment of tax havens.

The other cause for the establishment of tax havens is more benign. The justification in this case is that a combination of business-friendly policies, which tax havens provide, could induce investment in a territory's financial services industry. This can be seen as particularly attractive for countries without significant potential for heavy manufacturing industries but do not desire to develop a tourism industry either. This was exactly the case for the island of St. Croix in the U.S. Virgin Islands.[266] The U.S. Virgin Islands's Economic Development Commission's program of tax exemption and other business-friendly policies sought to incentivize the relocation of American companies to St. Croix. These American companies would not only invest in the local infrastructure and economy, but also hire local labor, bolstering local market economies.[267] The establishment of tax havens in this case, as a means of development in contrast to a focus on tax avoidance, is certainly more ethical. However, it is not guaranteed to produce beneficial results either for the territory itself or for the world at large.[268]

Western imperialists consciously and deliberately created networks of tax havens as their colonial empires were collapsing. This has given their businesses and wealthy individuals the tools to avoid paying their fair share. Tax havens are not natural creations nor have economic development and prosperity previously depended on the existence of such systems. For example, there have been plenty of periods of economic growth prior to 1995, the year of the foundation of the World Trade Organization which allowed tax havens to be much more viable. Additionally, the effects of these tax havens on other governments's tax revenue and development efforts have been devastating. Worse yet, the biggest victims of this lost governmental revenue are not located in the developed, prosperous Global North, but in the struggling, developing Global South.

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[264] Ibid. Pg. 215-216.

[265] McHugh, David. "Explainer: Curbing Tax Avoidance by Multinational Companies." AP NEWS. Associated Press, June 4, 2021. https://apnews.com/article/donald-trump-europe-health-coronavirus-pandemic-business-1ad0c2e08fc614f06ce83aca9b34ae84.

[266] Navarro, Tami. *Virgin Capital. Race, Gender, and Financialization in the US Virgin Islands*. Albany, NY: State University of New York Press, 2021. Pg. 6.

[267] Ibid.

[268] Ibid. Pg. 6-7.

III. THE MODUS OPERANDI OF INTERNATIONAL TAX EVASION VIA TAX HAVENS

A. METHODS OF TAX AVOIDANCE BY BUSINESSES

Moving large amounts of wealth from one country to another may seem simple at first thought. However, to satisfy different international regulations, distinct explanations must explicitly be provided as to why a particular amount of money is transported from one nation to another. One potential justification for businesses to move money out of a national jurisdiction is as part of a transaction with another foreign business so consequently, tax avoidance is exemplified through one of three methods: trade misinvoicing, transfer mispricing, and hot money.[269]

Firstly, trade misinvoicing is commonly used by companies to securely move their revenues into offshore financial centers. For example, Mining Corporation A may seek to move their new profits out of Brazil and into their financial account in the tax haven of the Cayman Islands while making a purchase for supplies, making a transaction with Supply Company B in Germany. In this transaction, Mining Company A communicates to Supply Company B that it seeks to make a $20 million purchase of supplies in which they would then ask Supply Company B to send an invoice of the transaction to the Cayman Islands first. Then, once the Cayman Islands receives the invoice from Supply Company B, they would then reinvoice the same transaction to Mining Company A in Brazil. Though, the key difference would be that the new invoice does not state that $20 million was originally agreed upon–rather, $25 million. Mining Company A would then proceed to send $25 million to the Cayman Islands where $20 million then gets forwarded to Supply Company B in Germany. The remaining $5 million is then deposited in Mining Company A's account in the Cayman Islands with all of the tax haven benefits–untaxed and away from the hands of any governmental tax collection system. Customs and tax officials in Brazil, meanwhile, are led to believe that $25 million was transferred out of the country solely for the sake of a business transaction. This process is then rinsed and repeated by multinational corporations and companies to continually move money out of whatever national jurisdiction they are operating in.[270] $879 billion is taken out of developing countries annually through this tactic.[271]

A similar and feasible tactic to trade misinvoicing involves two branches, or subsidiaries, of one larger multinational corporation called transfer mispricing. It refers specifically to the purchasing and selling of goods within a single larger business framework. For example, a subsidiary of a corporation in Canada may sell goods to a subsidiary of the same corporation in the United States. Transfer mispricing entails unreasonable pricing for the purchasing and selling of goods via this business framework. An example would be selling individual pencils for five thousand dollars each. These goods would typically be sold by subsidiaries based in a tax haven country. Through these deliberately and exorbitantly inflated prices for relatively cheap goods, multinational corporations can easily and efficiently move large amounts of money across

[269] Hickel, Jason. *The Divide: Global Inequality from Conquest to Free Markets*. New York, NY: W.W. Norton & Company, 2018. Pg. 210
[270] Ibid. Pg. 211.
[271] Ibid. Pg. 213.

borders into tax havens.[272] Furthermore, this tactic does not require the participation of any other third party. Transfer mispricing can also be applied to other services so that wealth can be moved internationally through unreasonably pricing, for example, plane rides.[273] In spite of such exploitative venues, legal scrutiny of transfer mispricing has increased in recent years. In 2019, the case *Altera Corporation & Subsidiaries v. Commissioner of Internal Revenue* dealt a blow to transfer mispricing after being appealed three times.[274] Specifically, Altera was at fault for its practices with its employees' stock options and whether their cost would apply in its cost-sharing agreement with its subsidiary in the Cayman Islands. Altera was ruled against in this case, achieving a victory for tax officials, albeit a minor one in specific regard to employee-owned stocks.[275] There is no reliable exact estimate for the amount of wealth gone untaxed through transfer mispricing.

The last method of international tax evasion is through a method called hot money. Hot money is the fast transfer of wealth internationally purposed to take advantage of different interest and exchange rates in different countries. This method is predominantly used by international investors hoping to profit off of speculations based on these rates. Hot money also has a more adverse short-term effect on the country where the capital is being moved out of in contrast to a country merely losing out on potential tax revenue. Specifically, aftershocks of these rapid wealth transfers can serve as catalysts of instability for markets, especially in small economies. Hot money has only been made possible by the previously mentioned deregulation of capital flows by the World Trade Organization. In all, hot money accounted for $211 billion flowing out of developing countries in 2013 alone.[276]

Trade misinvoicing, transfer mispricing, and hot money are the key strategies used by multinational corporations and businesses in order to move money effectively out of their countries of operation. The World Trade Organization's rules for customs invoices have allowed trade misinvoicing and transfer mispricing to be viable.[277] Specifically, under the organization's rules, customs officials cannot obstruct business transactions solely on the basis of unreasonable prices of goods and services.[278] It should also be noted that corporations do receive assistance, typically from the tax havens themselves, in moving wealth into their own jurisdictions.[279] Combined, these three methods of tax avoidance have allowed an estimated $14.3 trillion to escape tax collection systems in developing countries.[280]

B. METHODS OF TAX AVOIDANCE BY INDIVIDUALS

Wealthy individuals also take part in the business of tax avoidance, but sometimes have to adhere to a different playbook than multinational corporations. The effect of this tax avoidance

[272] Ibid. Pg. 212-213.
[273] Ibid. Pg. 214.
[274] Altera Corporation & Subsidiaries v. Commissioner of Internal Revenue, 16-70496, 16-70497 (9th Cir. 2018). https://cdn.ca9.uscourts.gov/datastore/opinions/2019/06/07/16-70496.pdf.
[275] Avi-Yonah, Reuven. "A Decisive Tax Defeat for the Multinationals?" The American Prospect, June 29, 2020. https://prospect.org/economy/decisive-tax-defeat-for-the-multinationals/.
[276] Hickel, Jason. *The Divide: Global Inequality from Conquest to Free Markets*. New York, NY: W.W. Norton & Company, 2018. Pg. 210-211.
[277] Ibid. Pg. 254.
[278] Ibid. Pg. 214.
[279] Ibid. Pg. 210-211.
[280] Ibid. Pg. 214.

has the same effect when perpetrated by businesses–governments are deprived of their due tax revenue. Additionally, individual tax evasion has become considerably less burdensome in recent years due to the combined factors of globalization and the use of the Internet.[281] Nevertheless, there are a couple common methods of tax avoidance exploited by wealthy individuals.

Common methods of individual tax evasion include not reporting certain income sources or by setting up various international business structures. Firstly, income from foreign investments in securities or from interest in foreign bank accounts is not monitored by an originating nation's, for example, America's tax authorities. Therefore, these revenue streams are not reported in tax files and not subjected to the originating country's taxation regulations.[282] Secondly, for the United States specifically, shell corporations among other types of structures could also be set up internationally to profit off of domestic investments. Through these economic institutions, individuals would be able to benefit off of certain American tax laws seeking to incentivize international investment.[283] For example, by using the Internet, either a shell company or a trust can be set up abroad, such as in the Cayman Islands or in another sink offshore financial center. Capital can then be electronically transported into the account of this new structure which would then be used for investments within the United States. Interest income as well as many types of capital gains by non-residents, like from a Cayman Islands bank account, would not be obligated to American taxes on this type of income.[284] Surprisingly, individual tax avoidance does not look much different from business tax evasion.

Furthermore, individual tax evasion relies on the inability of tax collection systems to correctly assess taxable streams of wealth. In particular, international investments and interest on wealth in foreign bank accounts go untaxed simply because foreign governments, tax haven or not, do not share this type of information with each other. For this financial information to be shared on an intergovernmental basis, international treaties known as Tax Information Exchange Agreements (TIEAs) need to be set up on either a bilateral or multilateral basis.[285] An example of this would be the information sharing system set up among European Union (EU) member states.[286] The effectiveness of TIEAs was showcased in the case of *United States of America v. Walter Anderson*;[287] by using offshore tax havens such as the British Virgin Islands and Bermuda among others, Mr. Anderson managed to conceal hundreds of millions of dollars in income from the American tax authorities. The United States' TIEA with Bermuda assisted in prosecuting Anderson and sentencing him to nine years in prison.[288] The widespread lack of this information sharing results in the collective wealth hoarded away internationally through individual tax evasion.

The Pandora and Panama Papers as well as other massive data leaks have exposed the magnitude of the issue in recent years along with the hundreds of public figures that participate

[281] Gravelle, Jane G. "Tax Havens: International Tax Avoidance and Evasion." *Congressional Research Service*, January 15, 2015. https://sgp.fas.org/crs/misc/R40623.pdf. Pg. 24

[282] Ibid.

[283] Ibid.

[284] Ibid. Pg. 25.

[285] Ibid. Pg. 26.

[286] Ibid. Pg. 24.

[287] United States of America v. Walter Anderson, 07-3045, 07-3053 (D.C. 2008). https://www.justice.gov/archive/opa/pr/2008/November/us-vs-anderson.pdf.

[288] United States Senate Committee of Finance. "Offshore Tax Evasion: Stashing Cash Overseas, Hearing before the Senate Finance Committee." HeinOnline, May 3, 2007. https://heinonline.org/HOL/Page?handle=hein.cbhear%2Fcblhafwt0001&id=127&collection=congrec#.

in tax avoidance schemes. From the King of Jordan to Ukrainian President Zelenskiy, many heads of state along with billionaires have sought to hide and protect their wealth.[289] In this pursuit, they have been largely successful, with estimates of $8.7 trillion, $11.3 trillion,[290] to up to $36 trillion of individual wealth held in offshore bank accounts.[291] This amounts to an annual loss in governmental tax revenue of approximately $255 billion.[292] Much like business tax avoidance, individual tax evasion occurs through activities that are not necessarily illegal or are otherwise difficult to monitor and surveil.[293]

IV. SOLUTIONS FOR A FAIRER GLOBAL TAX REGIME

Tax havens and the subsequent tax evasion have a drastic toll on governments around the world. The present narrative of "the rich are getting richer and the poor are getting poorer" adds to the urgency of solving the issue of properly taxing the wealthy. Additionally, the potential tax revenue that can be generated from dissolving tax havens and levying taxes on the trillions of dollars held in offshore accounts would be vital in the global fight against climate change and other social issues. Fortunately, there is already awareness surrounding the solutions that can be implemented to create a fairer global tax system.

Perhaps the most notable solution discussed in world media is the idea of a global minimum tax rate. In fact, as recent as October 2021, the Organization for Economic Cooperation and Development (OECD) announced an agreement between 136 nations to set a global minimum tax rate. Collectively comprising more than 90% of the global economy, the rate, which would be set at 15%, would apply to large businesses worldwide.[294] This solution is effective because it would forbid wealth to flee its country of origin to tax havens without having to pay base tax rate. Moreover, this solution would also discourage small nations from transforming into offshore tax havens as seen in preceding examples. Ultimately, however, the effectiveness of global solutions may be hampered due to the usual and expected sluggishness of a worldwide bureaucracy. This, coupled with the need for substantial international political capital for such solutions, renders this type of solution least desirable.

An alternative solution to combating tax evasion includes stricter laws and regulations at a national level paired with sustained international cooperation. There has also been proposed action through this method, specifically through the OECD's plan on corporate tax avoidance.[295] Governments can also impose taxes on companies' profits including their income made overseas

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[289] Guardian Investigations Team. "Pandora Papers: Biggest Ever Leak of Offshore Data Exposes Financial Secrets of Rich and Powerful." The Guardian. Guardian News and Media, October 3, 2021. https://www.theguardian.com/news/2021/oct/03/pandora-papers-biggest-ever-leak-of-offshore-data-exposes-financial-secrets-of-rich-and-powerful.

[290] Ibid.

[291] Shaxson, Nicholas. "Tackling Tax Havens." IMF F&D, September 2019. https://www.imf.org/external/pubs/ft/fandd/2019/09/tackling-global-tax-havens-shaxon.htm.

[292] Gravelle, Jane G. "Tax Havens: International Tax Avoidance and Evasion." *Congressional Research Service*, January 15, 2015. https://sgp.fas.org/crs/misc/R40623.pdf. Pg. 27

[293] Ibid. Pg. 28.

[294] Thomas, Leigh. "Explainer: What Is the Global Minimum Tax Deal and What Will It Mean?" Reuters. Thomson Reuters, October 8, 2021. https://www.reuters.com/business/finance/what-is-global-minimum-tax-deal-what-will-it-mean-2021-10-08/.

[295] Gravelle, Jane G. "Tax Havens: International Tax Avoidance and Evasion." *Congressional Research Service*, January 15, 2015. https://sgp.fas.org/crs/misc/R40623.pdf. Pg. 28

through their subsidiaries. In the United States alone, this change is estimated to raise somewhere between $63.4 billion to $83.4 billion annually in tax revenue.[296] Moreover, this proposal would dissuade multinational corporations from continually seeking out the services of tax havens through subsidiaries to shield their profits by forcing them to pay their tax obligations regardless. A different solution would be to directly punish businesses and corporations that have financial interactions with tax havens and other secrecy jurisdictions such as through sanctions.[297] With this, trade misinvoicing and transfer mispricing become relatively pointless exercises. However, these approaches are not sufficient on their own to combat individual tax evasion. On this front, both administrative and enforcement mechanisms of national tax regimes would need to be improved. Most importantly, enhanced international information sharing and cooperation such as through the above mentioned EU program would be most effective in tracking the cross-border flow of wealth. This new system could be built into existing organizations such as the United Nations or the World Bank or through new TIEAs.[298] Ideally, global financial transparency can be achieved and all owners of shell corporations and secret bank accounts can be revealed so that these individuals and companies can be taxed by their countries of origin.[299] Enhanced transparency should also include reports on virtual international transfers of wealth made over the Internet. The last solution is to empower domestic tax collection agencies such as the Internal Revenue Service in the United States to more aggressively collect financial information and enforce tax payments.[300] All these solutions, while not "perfect," are the most practical to implement as they do not require multilateral international cooperation; national governments will have stronger capabilities to clamp down on tax avoidance.

A key detail that must be addressed is that the most afflicted victims of tax evasion are developing countries in the Global South. As previously mentioned, the world trade system has fundamentally enabled the system of offshore tax havens to further enrich Western multinational corporations and individuals. Solutions in this regard require a redefining of global trade rules. Specifically, the rules of the World Trade Organization forbidding customs officials from interrogating invoices suspected of perpetuating trade misinvoicing and transfer mispricing must be reformed. This would allow customs officials to stop trade either among different companies or different subsidiaries of one company when prices appear to be unrealistic or unreasonable. An alternative fix would be country-by-country reporting. Country-by-country reporting involves multinational businesses to report revenues to the nations where their operations occur instead of wherever they are headquartered. This would be beneficial to developing countries, allowing them to collect revenue from the already-wealthy Western multinational corporations. Lastly, more extreme solutions include the complete dismantling of tax havens altogether.[301] This type of head-on approach would perhaps be the most effective, but would require the most political capital, making it the least practical. In the end, these steps would allow for a global

[296] Ibid.
[297] Ibid. Pg. 35-36.
[298] Ibid. Pg. 34-35.
[299] Hickel, Jason. *The Divide: Global Inequality from Conquest to Free Markets*. New York, NY: W.W. Norton & Company, 2018. Pg. 254.
[300] Gravelle, Jane G. "Tax Havens: International Tax Avoidance and Evasion." *Congressional Research Service*, January 15, 2015. https://sgp.fas.org/crs/misc/R40623.pdf. Pg. 37.
[301] Hickel, Jason. *The Divide: Global Inequality from Conquest to Free Markets*. New York, NY: W.W. Norton & Company, 2018. Pg. 254-255.

transformation and remedy the brutal power imbalance that has long existed between rich and impoverished nations.

V. CONCLUSION

Tax havens, offshore financial centers, and other secrecy jurisdictions have fundamentally allowed the rich to get richer while depriving world governments of much needed funds. Their historical roots are planted in a global system designed to allow those in the Global North to flee their responsibility of paying their fair share not only to their own governments, but also to the governments of the countries they exploit. This global system was partially made from the remnants of former colonial empires but was not activated until the neoliberal rules of "free trade" were enforced by the World Trade Organization. Tax havens, however, were not all created under this pretense. The U.S. Virgin Islands is just one jurisdiction that made the independent decision to serve as an offshore financial center to the global economy for the purpose of domestic economic development. Nevertheless, the end result is the same: widespread tax avoidance by both individuals and businesses.

While the outcomes are inherently the same, the methods of tax avoidance are not–trade misinvoicing, transfer mispricing, and hot money are the three most important methods used by businesses in their movement of cash to tax havens. Through these strategies, the customs and tax officials in the nations where a business is operating are misled about a company's true operations. Unfortunately, they are forced not to impede these activities due to the deregulation of capital flows enforced by the World Trade Organization. Individual tax avoidance, in contrast, takes advantage of the lack of information sharing between nations. With these points in mind, the entire nexus of tax havens and their use by multinational corporations and wealthy individuals must be challenged.

A number of solutions are presently available to tackle the issue, whether at the national or international level. National solutions such as strengthening the capabilities of domestic tax authorities and the establishment of bilateral information sharing agreements such as through TIEAs are feasible and do not require broad global consensus. More comprehensive fixes, however, such as a global minimum corporate tax rate, will surely need years of negotiations among all actors on the global stage. Even then, the most effective solution at hand–the complete abolition of tax havens–will require a complete transformation of international trade. Needless to say though, the status quo is unacceptable and allows the already-rich to continue to amass wealth at the expense of all others.